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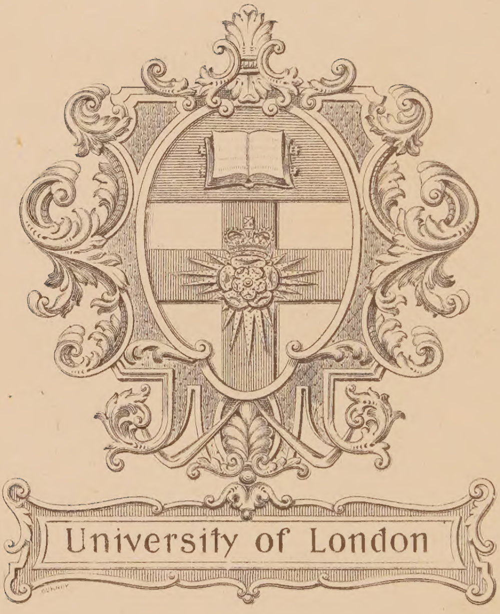
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1945

THE
LAW REPORTS
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KING'S BENCH DIVISION
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL,
DECISIONS IN
THE COURT OF CRIMINAL APPEAL,
AND DECISIONS OF THE
RAILWAY AND CANAL COMMISSION.

◆

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PUBLISHED BY THE COUNCIL AT ITS OFFICE, 6 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY GEO. BARBER & SON LTD., 23 FURNIVAL STREET,
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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1945, is as follows:—

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In the Third Series,
[1945] A. C.

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RULES AND ORDERS JUDICIALLY CONSIDERED.

Conditions of Employment and National Arbitration Order, 1940 (*St. R. & O.*, 1940, *No.* 1305), *art.* 5, *para.* 1. Hulland *v.* William Sanders and Son - - - - **C. A. 78**

County Court Rules, 1936, *Or.* 7, *rr.* 1, 2; *Or.* 15, *rr.* 1, 6. Legon *v.* Count **C. A. 391**

Defence (*General*) (*St. R. & O.*, 1939, *No.* 927) *reg.* 51. James Macara, Ld. *v.* Barclay - - - **C. A. 148**

Defence (*General*) (*St. R. & O.*, 1939, *No.* 927) *reg.* 51 (*as amended*). Ouardi Kavala, Ld. *v.* Grigg **Atkinson J. 157; C. A. 323**

Essential Work (*General Provisions*) (*No.* 2) *Order*, 1942 (*St. R. & O.*, 1942, *No.* 1594), *art.* 4 (1) (*a*). Adrema, Ld. *v.* Jenkinson **Divl. Ct. 446**

Medical Referees, Regulations as to, 1932 (*St. R. & O.*, 1932, *No.* 960), *reg.* 25. Smith *v.* National Meter Co., Ld. - - **Uthwatt J. 543**

Pensions Appeal Tribunals (*England and Wales*) *Rules*, 1943 (*St. R. & O.*, 1943, *No.* 1757, L. 39), *paras.* 5, 12 Moxon *v.* Minister of Pensions **Tucker J. 490**

Personal Injuries (*Civilians*) *Scheme*, 1944 (*St. R. & O.*, 1944, *No.* 369), *Part IV.*, *art.* 12, *para.* 2 (*a*). *Ex parte* Haines - - - **Tucker J. 183**

Prevention of Accidents Rules, 1902 (*St. R. & O.*, 1902, *No.* 616), *r.* 9. Berriman *v.* London & North Eastern Ry. Co. - - - - **C. A. 462**

R. S. C., Or. 8, *r.* 1; *Or.* 64, *r.* 7. BATTERSBY *v.* ANGLO-AMERICAN OIL CO., LD. **C. A. 23**

—— *Or.* 42, *r.* 17. MARINE, &C. ASSURANCE SOCIETY *v.* FELTWELL FEN SECOND DISTRICT DRAINAGE BOARD **Evershed J. 394**

—— *Or.* 58, *r.* 15. EGERTON AND OTHERS *v.* SHIRLEY - - - - **C. A. 107**

Solicitors' Practice Rules, 1936 (*St. R. & O.* 1936, *No.* 1005/L. 24), *r.* 4 (*c*). *In re* A SOLICITOR - - - **C. A. 368**

Summary Jurisdiction Rules, 1915 (*St. R. & O.*, 1915, *No.* 200), *r.* 52. GOLDMAN *v.* EADE - - **Divl. Ct. 57**

Woodworking Machinery Regulations, 1922 (*St. R. & O.*, 1922, *No.* 1106), *reg.* 10. NICHOLLS *v.* F. AUSTIN (LEYTON), LD. - - **C. A. 50**

STATUTES JUDICIALLY CONSIDERED.

1827.

Excise Management (7 & 8 *Geo.* 4, *c.* 53), *s.* 82. REX *v.* KEEPERS OF PEACE AND JUSTICES FOR COUNTY OF LONDON - - **Divl. Ct. 528**

1838.

Small Tenements Recovery (1 & 2 *Vict.*, *c.* 74), *ss.* 1 *and* 7. BAILEY *v.* HOOKWAY - - **Divl. Ct. 266**

1842.

Defence (5 & 6 *Vict.*, *c.* 94) (*as amended*). OUARDI KAVALA, LD. *v.* GRIGG **Atkinson J. 157; C. A. 323**

1845.

Gaming (8 & 9 *Vict.*, *c.* 109), *ss.* 17, 18. REX *v.* LEON - - - **C. C. A. 136**

1857.

Summary Jurisdiction (20 & 21 *Vict.*, *c.* 43), *s.* 5. REX *v.* WATSON. *Ex parte* BRETHERTON - - **Divl. Ct. 96**

1869.

Debtors (32 & 33 *Vict.*, *c.* 62), *s.* 13, *sub-s.* 1. REX *v.* LEON - **C. C. A. 136**

1871.

Prevention of Crimes (34 & 35 *Vict.*, *c.* 112), *s.* 7. REX *v.* JOHNSON **C. C. A. 419**

1879.

Summary Jurisdiction (42 & 43 *Vict.*, *c.* 49), *s.* 9, *sub-s.* 2. REX *v.* DURHAM JUSTICES. *Ex parte* LAURENT **Divl. Ct. 33**

—— —— *s.* 44. ARNELL *v.* HARRIS **Divl. Ct. 60**

1887.

Coroner's (50 & 51 *Vict.*, *c.* 71), *s.* 6. REX *v.* REYNOLDS - **Lawrence J. 20**

Merchandise Marks (50 & 51 *Vict.*, *c.* 28), *s.* 2, *sub-s.* 2. STOODLEY *v.* H. W. THOMAS & SONS, LD. **Divl. Ct. 413**

1889.

Weights and Measures (52 & 53 *Vict.*, *c.* 21), *s.* 29. BRENTNALL & CLELAND, LD. *v.* LONDON COUNTY COUNCIL **Divl. Ct. 115**

1892.

Private Street Works (55 & 56 *Vict.*, *c.* 57), *s.* 13, *sub-s.* 1. POOLE CORPORATION *v.* MOODY - - **C. A. 350**

—— —— *s.* 7 (*f*), *s.* 22. WATFORD CORPORATION *v.* LONDON PASSENGER TRANSPORT BOARD - **Wrottesley J. 129**

1895.

Summary Jurisdiction (*Married Women*) (58 & 59 *Vict.*, *c.* 39), *ss.* 4 *and* 5 (*a*) *and* (*c*). SANDILANDS *v.* CARUS - - - - **C. A. 270**

1896.

Truck (59 & 60 *Vict.*, *c.* 44), *s.* 1. BIRD *v.* BRITISH CELANESE, LD. **C. A. 336**

1900.

Railway Employment (*Prevention of Accidents*) (63 & 64 *Vict.*, *c.* 27), *s.* 1, *sub-s.* 1; *sch. No.* 12. BERRIMAN *v.* LONDON & NORTH EASTERN RY. CO. **C. A. 462**

1907.

Criminal Appeal (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1. REX *v.* JOHNSON **C. C. A. 419**

1914.

Criminal Justice Administration (4 & 5 *Geo.* 5, *c.* 58), *s.* 37, *sub-s.* 1. REX *v.* DURHAM JUSTICES. *Ex parte* LAURENT - - **Divl. Ct. 33**

1920.

Increase of Rent and Mortgage Interest (Restrictions) (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 2. Vaughan *v.* Shaw - - **C. A. 400**

—— —— *s.* 12, *sub-s.* 1 (*g*). Summers *v.* Donohue - - - **C. A. 376**

—— —— *s.* 12, *sub-s.* 2. Neale *v.* Del Soto **C. A. 144**

—— —— Cole *v.* Harris - - **C. A. 474**

—— —— *s.* 15. Engvall *v.* Ideal Flats, Ld. - - - - **C. A. 205**

—— —— *s.* 15, *sub-s.* 1; *s.* 16, *sub-s.* 3. Morrison *v.* Jacobs - **C. A. 577**

1925.

Criminal Justice (15 & 16 *Geo.* 5, *c.* 86), *s.* 26, *sub-s.* 1. Rex *v.* Durham Justices. *Ex parte* Laurent **Divl. Ct. 33**

Rating and Valuation (15 & 16 *Geo.* 5, *c.* 90), Upper Agbrigg Assessment Committee *v.* Bents Brewery Co., Ld. **C. A. 196**

Summary Jurisdiction (*Separation and Maintenance*) (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1. Sandilands *v.* Carus - - - - **C. A. 270**

Supreme Court of Judicature (*Consolidation*) (15 & 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1. Egerton and Others *v.* Shirley - - - **C. A. 107**

Workmen's Compensation (15 & 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*f*), *sch. III.* 12*a*. Smith *v.* National Meter Co., Ld. - - **Uthwatt J. 543**

1926.

Sale of Food (*Weights and Measures*) (16 & 17 *Geo.* 5, *c.* 63), *s.* 12, *sub-s.* 2. Brentnall & Cleland. Ld. *v.* London County Council - **Divl. Ct. 115**

1927.

Trade Disputes and Trade Unions (17 & 18 *Geo.* 5, *c.* 22), *s.* 1, *sub-s.* 2. Rex *v.* Tearse - - - **C. C. A. 1**

1930.

Land Drainage (20 & 21 *Geo.* 5, *c.* 44), *s.* 29, *sub-s.* 2. Port of London Authority *v.* Essex Rivers Catchment Board - - - - **C. A. 101**

Road Traffic (20 & 21 *Geo.* 5, *c.* 43), *s.* 22, *sub-s.* 2; *s.* 40, *sub-s.* 2. Peek *v.* Towle - - - **Divl. Ct. 458**

1933.

Rent and Mortgage Interest Restrictions (*Amendment*) (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sch. I.*, *para.* (*h*), Sharpe *v.* Nicholls - **C. A. 382**

—— —— Morrison *v.* Jacobs - **C. A. 577**

—— —— *sch. I.*, *para.* (*h*). Epps *v.* Rothnie **C. A. 562**

—— —— *s.* 16. Vaughan *v.* Shaw **C. A. 400**

Local Government (23 & 24 *Geo.* 5, *c.* 5), *s.* 225, *sub-ss.* 1, 2. Rex *v.* Hurle-Hobbs - - - **Divl. Ct. 165**

1934.

Betting and Lotteries (24 & 25 *Geo.* 5, *c.* 58). *s.* 26, *sub-s.* 1. Bretherton *v.* United Kingdom Totalisator Co., Ld. - - **Divl. Ct. 555**

County Court (24 & 25 *Geo.* 5, *c.* 53), *ss.* 40, 42, 64. Legon *v.* Count, **C. A. 391**

—— —— *s.* 105 (*a*). Brett *v.* Thrower **C. A. 521**

1936.

Public Health (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 19), *s.* 58. McVittie *v.* Bolton Corporation - - - **C. A. 281**

1937.

Factories (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1; *s.* 60, *sub-ss.* 1, 2 (*c*); *s.* 159, *sub-s.* 1. Nicholls *v.* F. Austin (Leyton), Ld. **C. A. 50**

1938.

Administration of Justice (*Miscellaneous Provisions*) (1 & 2 *Geo.* 6, *c.* 63), *s.* 19, *sch.* 2. Rex *v.* Sir Bertrand Watson. *Ex parte* Bretherton **Divl. Ct. 96**

Food and Drugs (1 & 2 *Geo.* 6, *c.* 56), *s.* 80, *sub-s.* 3. Sherwood *v.* Cox **Divl. Ct. 549**

—— —— *s.* 83, *sub-s.* 3. Atterton *v.* Browne - - - **Divl. Ct. 122**

1939.

Compensation (*Defence*) (2 & 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*d*). Looker *v.* Regem **Viscount Caldecote C.J. 39**

Emergency Powers (*Defence*) (2 & 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-ss.* 1, 2 (*b*) (i), 4. OUARDI KAVALA, LD. *v.* GRIGG **C. A. 323**

Limitation (2 & 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-ss.* 1 (*d*), 7; *s.* 18, *sub-s.* 1, 5. POOLE CORPORATION *v.* MOODY - **C. A. 350**

—— —— *s.* 21, *sub-s.* 1. WOODWARD *v.* MAYOR OF HASTINGS AND ANOTHER **C. A. 174**

Pensions (*Navy, Army, Air Force and Mercantile Marine*) (2 & 3 *Geo.* 6, *c.* 93), *ss.* 3 *and* 10 *In re* SAFFELL **Tucker J. 259**

Personal Injuries (*Emergency Provisions*) (2 & 3 *Geo.* 6, *c.* 82), *ss.* 3 *and* 8, *sub-s.* 1. GREENFIELD *v.* LONDON AND NORTH EASTERN RAILWAY CO. **C. A. 89**

—— —— *s.* 3, *sub-s.* 1; *s.* 8, *sub-s.* 1. BILLINGS *v.* REED - - **C. A. 11**

—— —— *s.* 8, *sub-s.* 1. *Ex parte* HAINES **Tucker J. 183**

Prevention of Fraud (*Investments*) (2 & 3 *Geo.* 6, *c.* 16), *s.* 1, *sub-s.* 1 (*a*); *s.* 26, *sub-s.* 1. REX *v.* HAMID **C. C. A. 540**

Rent and Mortgage Interest Restrictions (2 & 3 *Geo.* 6, *c.* 71), *ss.* 1, 7, *sub-s.* 1. VAUGHAN *v.* SHAW - - **C. A. 400**

1941.

Liabilities (*War-time Adjustment*) (4 & 5 *Geo.* 6, *c.* 24), *ss.* 3, *sub-s.* 2; 6, *sub-s.* 1. *In re* AFFAIRS OF ALSOP **C. A. 404**

Pharmacy and Medicines (4 & 5 *Geo.* 6, *c.* 42). *s.* 11, *sub-s.* 1 (*a*); *s.* 13, *sub-s.* 1 (*a*). PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* HEPPELLS (1932), LD. **Divl. Ct. 454**

1942.

Pensions (*Mercantile Marine*) (5 & 6 *Geo.* 6, *c.* 26), *s.* 1, *sub-ss.* 1, 2, 3; *s.* 5. *In re* SAFFELL - - **Tucker J. 259**

—— —— *s.* 5. *Ex parte* HAINES **Tucker J. 183**

1943.

Courts (*Emergency Powers*) (6 & 7 *Geo.* 6, *c.* 19). EGERTON AND OTHERS *v.* SHIRLEY - - - - **C. A. 107**

Pensions Appeal Tribunals (6 & 7 *Geo.* 6, *c.* 30), *s.* 6. MOON *v.* MINISTER OF PENSIONS - - **Tucker J. 490**

War Damage (6 & 7 *Geo.* 6, *c.* 21), *s.* 83, *sub-s.* 1; *s.* 84, *sub-ss.* 1 *and* 4; *ss.* 85 *and* 104. HILL *v.* REGEM. **Humphreys J. 329**

1944.

Liabilities (*War-Time Adjustment*) (7 & 8 *Geo.* 6, *c.* 40), *ss.* 6, *sub-s.* 1; 21. *In re* AFFAIRS OF ALSOP - **C. A. 404**

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

REX *v.* TEARSE AND OTHERS.

C. C. A.

1944
Aug. 23, 24;
Sept. 25.

Humphreys, Wrottesley and Tucker JJ.

Criminal law—Trade Union—Illegal strike—" Acts in furtherance of "—Acts done before beginning of strike—Trade Disputes and Trade Unions Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 22), *s.* 1, *sub-s.* 2*—Practice—Indictment—Particulars—Count alleging " acts in furtherance of" an illegal strike.*

Acts done in preparation for an illegal strike are not " acts in " furtherance " thereof within the meaning of s. 1, sub-s. 2, of the Trade Disputes and Trade Unions Act, 1927. The words " in " furtherance " in that statute import the existence of the object sought to be furthered.

Dicta of Lord Loreburn L.C., and Lord Shaw in *Conway* v. *Wade* [1909] A. C. 512, 522, followed:—

Held, further, that where an indictment included among other counts one alleging " acts in furtherance " it was desirable that particulars of those acts should be included in the indictment.

APPEALS against convictions.

The three appellants, Rawling Tearse, Lambert Heaton Lee and James Ritchie Haston, were charged on indictment

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at Newcastle Assizes before Cassels J. with (*a*) conspiring together to act in furtherance of a strike of shipyard apprentices declared by s. 1 of the Trade Disputes and Trade Unions Act, 1927 (1), to be illegal; (*b*) acting in furtherance of such a strike; (*c*) aiding and abetting the commission of such an illegal strike by aiding others to act in furtherance of it; and (*d*) conspiring to incite the apprentices and others to declare such an illegal strike. The acts alleged consisted in helping the apprentices to prepare for a strike by organizing committees, preparing documents and propaganda and making speeches.

During the trial counsel for the defence submitted (inter alia) that the words of the statute "in furtherance of" presupposed the existence of a strike, and that, therefore, the acts with which the appellants were charged, having been done before the commencement of the strike on March 28, 1944, could not be said to be in furtherance thereof. Cassels J., however, directed the jury that it was not necessary that the act in furtherance of an illegal strike should be done during the actual time of the strike. "It may be," he said, "an act before the strike as well as an act during the strike, "if it should be an act in preparation for the strike." The jury acquitted the appellants on charges (*a*) and (*d*), but found them Guilty on charges (*b*) and (*c*), and they were sentenced to terms of imprisonment. The appellants appealed.

J. Burge for the appellants. The statute under which these prosecutions were brought was passed as a consequence of the general strike of 1926, and has never before been invoked. The words "acts in furtherance of a strike . . . . declared "by this Act to be illegal" presuppose the existence of a strike, for one cannot act in "furtherance" of something which

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(1) Trade Disputes and Trade Unions Act, 1927, s. 1, sub-s. 1: "It is hereby declared—(*a*) that "any strike is illegal if it—(i.) "has any object other than or in "addition to the furtherance of a "trade dispute within the trade or "industry in which the strikers "are engaged; and (ii.) is a strike "designed or calculated to coerce "the government either directly "or by inflicting hardship upon "the community; . . . . and it "is further declared that it is "illegal to commence, or con- "tinue, or to apply any sums in "furtherance or support of, any "such illegal strike."

Sub-section 2: "If any person "declares, instigates, incites "others to take part in or other- "wise acts in furtherance of a "strike or lock-out declared by "this Act to be illegal, he shall be "liable" to penalties.

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does not exist. One can only act in anticipation of it. The trial judge misdirected the jury and the appellants were wrongly convicted, because the acts with which they were charged were done when no strike was in being, and had no connexion with the strike which subsequently occurred. There may possibly be doubt about the meaning of " furtherance " in ordinary phraseology, but it has been given judicial interpretation by the House of Lords in connexion with strikes and trade disputes. In *Conway* v. *Wade* (1) Lord Loreburn, L.C., interpreting the phrase " contemplation or furtherance " of a trade dispute " in s. 3 of the Trade Disputes Act, 1906, said : " I think they mean that either a dispute is imminent " and the act is done in expectation of and with a view to it, " or that the dispute is already existing and the act is done in " support of one side of it. In either case the act must be " genuinely done as described, and the dispute must be a real " thing imminent or existing." See also per Lord Shaw (2) : " With regard to the term ' furtherance of ' a trade dispute, " I think that must apply to a trade dispute in existence." The words " in contemplation " were deliberately omitted by Parliament from the Trade Disputes and Trade Unions Act, 1927. [He also referred to *North British Railway Co.* v. *Budhill Coal & Sandstone Co.* (3).]

Paley Scott K.C. and *J. Charlesworth* for the Crown. " In furtherance of " embraces not only acts done after the actual withdrawal of labour, but also any acts done for the purpose of bringing about a strike. The fact that the words " in contemplation " were omitted from the Act of 1927 is clear indication that the words " in furtherance of " were intended to have a more extended meaning. Although, as a rule, most acts in furtherance of a strike come, from the nature of things, after strike notices have been given, those words are meant to be wide and to cover acts done to assist or support not only those who are, but also those who are expected to be, on strike. The Act of 1927 was passed to prevent sympathetic strikes and to endeavour to make certain that anybody who gave real help in bringing about an illegal strike should be made answerable for so doing. " Acts in " furtherance of " has never received judicial interpretation. The observations of their Lordships in *Conway* v. *Wade* (4) were obiter dicta.

(1) [1909] A. C. 506, 512.
(2) Ibid. p. 522.
(3) [1910] A. C. 116, 127.
(4) [1909] A. C. 506.

THE COURT allowed the appeals, but took time to put the reasons for its decision in writing.

September 25. WROTTESLEY J. read the judgment of the court in which he stated the facts and continued: The evidence of the prosecution was in the main uncontradicted, and consisted of the story told by one, Davey and other apprentices, and of correspondence and other documents prepared by one or other of the appellants, the authenticity of which was not disputed. In general, this evidence was, before the conclusion of the trial, confirmed by the evidence of the appellants themselves. From this it is abundantly clear that there was ample material on which a jury might have found all the appellants, with the possible exception of Haston, Guilty on the first count, namely, of conspiracy to act in furtherance of the strike, which actually occurred, and also of conspiracy to incite and of actually inciting the apprentices to strike, as, in fact, they did, after the issue of a letter on March 7, 1944, to the Minister of Labour, threatening that unless legislation were passed within three weeks to guarantee the unconditional exemption of all apprentices (irrespective of industrial group) from liability to direction under the Mining Ballot Scheme, the apprentices' labour would be withheld. The jury, however, negatived the case for the Crown under these heads, and found the appellants Guilty only of doing acts in furtherance of the strike and of aiding and abetting Davey and others to act in furtherance of a strike.

It is necessary here to say that the bulk of the evidence dealt with the acts and behaviour of the appellants before the strike broke out, which consisted of the preparation of plans, some of which were reduced into writing, for the setting up of various committees for the better and more efficient conduct of the strike, and for the co-ordination of it with other strikers elsewhere, and the preparation of documents for the purpose of inflaming the minds of the apprentices, and the making of speeches to meetings of apprentices along the same lines. At the close of the evidence for the Crown, defending counsel submitted, among other matters, that the words in the Trade Disputes and Trade Unions Act, 1927, "acts in furtherance "of a strike," presuppose the existence of a strike, and that, therefore, nothing that took place before March 28, the day when the strike began, could be said to be such an act. On that submission the trial judge ruled that the prosecution were not confined to acts done after the strike had begun, and in the course of his summing up he said: "It is not "necessary that the act in furtherance of an illegal strike "should be during the actual time of the strike It may be "an act before the strike as well as an act during the strike, "if it should be an act which could reasonably be regarded, "upon the evidence, as an act in preparation for the strike "and that the strike is an illegal one. Counts 6, 7, 8 and 9 "are against respectively Tearse, Lee, Keen and Haston for "aiding and abetting Davey and others to act in furtherance "of a strike declared by the Act of Parliament to be illegal, "and you may take it that a person aids and abets the "commission of an offence if he is present and assists in "carrying it out." These appellants say that, in view of the language of the section, that was a misdirection of law. The matter is not free from doubt, but this court has come to the conclusion that the view submitted by counsel for the appellants at the trial and here before us, is the true view, and I proceed to give the reasons which have induced us to come to this conclusion.

The important words in s. 1, sub-s. 2, of the Act of 1927 are: "If any person declares, instigates, incites others to "take part in or otherwise acts in furtherance of a strike. ". . . ." If these words fell to be construed apart from the consideration of previous legislation and pronouncements on that legislation, it might be difficult to suggest that any restriction should be placed on the meaning of the word "furtherance." In English literature it is found applied equally to mean the advancement of things before they come into existence and after they have been begun, but the words "in furtherance of a trade dispute" have a history. The Trade Disputes Act, 1906, s. 1, which is to be construed as one with, among others, the Trade Disputes and Trade Unions Act, 1927, added to s. 3 of the Conspiracy and Protection of Property Act, 1875, the following paragraph: "An act done "in pursuance of an agreement or combination by two or more "persons shall, if done in contemplation or furtherance of "a trade dispute, not be actionable unless the act, if done "without any such agreement or combination, would be "actionable." In *Conway* v. *Wade* (1), the defendant, a trade union representative, who had succeeded in getting a man dismissed from his employment by threatening to "bring out" the other employees unless he were dismissed, invoked the

(1) [1909] A. C. 506.

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protection of this paragraph. A jury found that no trade dispute was at the time within contemplation or in existence, and that the defendant acted as he did with a view to forcing the plaintiff to pay a fine due to the trade union, and they awarded the plaintiff damages. In upholding that decision, some of their Lordships took the opportunity to consider and observe on the meaning of the language "an act done in "contemplation or furtherance of a trade dispute." Both Lord Loreburn, L.C., and Lord Shaw expressed the view that "an act done in contemplation" meant an act done before the dispute arose, and "an act done in furtherance" meant an act done when the dispute had come into existence. These observations, and this distinction, were not necessary to the decision in that case, but this court thinks there can be no doubt that they are right. If "act done in furtherance" had meant or included an act done with a view to the dispute and before it came into existence, there was no need for the words "in contemplation of."

When the Act of 1927 was passed, Parliament must have been aware that the words "in furtherance of" an object had the restricted meaning that the thing to be furthered must be in existence. The more so as the word is used more than once elsewhere in the Act in a context in which it refers to something already in existence. Is there anything in s. 1, sub-s. 2, of the Act of 1927 to indicate that a wider meaning is to be attributed to this phrase? First, it is here linked up with the word "strike" as contrasted with "dispute." That cannot, we think, lead to a wider meaning for the word "furtherance." Secondly, it is here used not merely to define the limits within which a man may lawfully agree with another in restraint of trade, but to create a new statutory indictable offence. In such a context it would require clear words to indicate that "furtherance" is to be given a wider meaning than it carries in other parts of these Acts (which are to be read as one) and, indeed, in the Act itself. It was suggested that the whole phrase is a mere repetition of the former phrase "in contemplation or furtherance," substituting for the vague words "in "contemplation" words more appropriate for a criminal offence, namely, declaring, instigating, inciting. It is not necessary for us either to assent to or dissent from this proposition, but we should not expect the legislature to create new statutory offences by the use of words so vague as "acts in contemplation of a strike."

In the event, therefore, we think that the acts done before a strike which are made crimes by this section are the matters mentioned eo nomine, that is to say, declaring it, instigating it, inciting to it, and that the acts " otherwise in furtherance of " a strike " which are made crimes by the section are acts done after the strike has commenced. Applying this conclusion to the case under appeal, the jury should have been directed by the judge that under the counts alleging acts of furtherance or aiding and abetting others to do acts of furtherance, they must confine their attention to evidence of acts committed after the strike had broken out. In fact, the jury were, as has been pointed out, told the contrary of this, and the convictions under these counts cannot stand, and must be quashed.

There is one other matter on which we think it is desirable that we should say something. Perhaps because, in the case under appeal, both those concerned for the prosecution and those concerned for the defence concentrated their attention on the more important counts, such as the conspiracy counts and the counts relating to incitement, no particulars were either included in the indictment or demanded by the defence of the counts alleging acts in furtherance. From every point of view, but particularly from the point of view of those accused of such matters, we think it desirable that where counts are included in an indictment alleging acts of furtherance, particulars of such acts should be included in the indictment.

Convictions quashed.

Solicitors for appellants: *Smithdale, Rutledge & Co.*
Solicitor for Crown: *Director of Public Prosecutions.*

A. W. G.

THE KING v. THE HOME SECRETARY. *Ex parte* L. AND ANOTHER

1944
July 26.

Viscount
Caldecote C.J.,
Humphreys and
Wrottesley JJ.

Enemy alien—Change of nationality in war time—Decree of enemy government—Enemy alien rendered stateless—Internment—Writ of habeas corpus.

The courts of this country will not in time of war recognize any change of nationality brought about by a decree of an enemy state, which purports to turn any of its subjects into a stateless

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person or a subject of a neutral state. Therefore an alien enemy, who in consequence of such decree has become a stateless person, still retains, in law, his enemy status, and if interned in this country cannot move for a writ of habeas corpus.

APPLICATION for a writ of habeas corpus (1).

The applicants were at one time Austrian nationals, but became German nationals in consequence of a German decree of July 3, 1938, the effect of which was recognized by His Majesty's Government, and therefore, when war broke out they became enemy aliens as subjects of Germany. In the course of the war, in 1941, a decree was made in Germany under which a Jew who had his ordinary residence outside Germany could not be a German national; and a Jew was regarded as having his ordinary residence outside Germany if he sojourned outside Germany in circumstances which made it clear that his sojourn there was not merely transitory. The decree went on to provide that a Jew lost German nationality on the coming into force of the decree if on that date he had his ordinary residence outside Germany.

The applicants, who were Jews within the meaning of the decree, left Austria to go to France in 1938, and they remained in France until 1941, when they were minded to go to South America. They went by a ship which sailed to South America via the Port-of-Spain in Trinidad. When the ship reached the Port-of-Spain an Order of Detention, the lawfulness of which was disputed by the applicants, was made in respect of them and they were brought to the United Kingdom, where they had since been interned. In these circumstances they applied for a writ of habeas corpus, on the ground that the order for their detention was not lawfully made. The point, however, was raised whether as alien enemies it was not open to them to make this application, or whether owing to the German decree of 1941 they had ceased to be alien enemies.

Harold Brown for the applicants.

Sir Donald Somervell A.-G. and *Valentine Holmes* for the respondent.

VISCOUNT CALDECOTE C.J. It is conceded that the applicants were enemy aliens when the war broke out, and it is not disputed by counsel for the applicants that an interned enemy alien is not in a position to apply for a writ of habeas corpus. If effect must be given to the German decree, so as to deprive these people of their German nationality and to make them stateless, they would, of course, no longer be enemy aliens and they would not come under the disabilities which fall on enemy aliens. The point that arises is one which, for reasons which are not far to seek, has never been made the subject of express decision. Reference, however, may be made to *Rex* v. *Lynch* (1) where a man was charged with high treason and he had sought to divest himself of his British nationality, and to become the subject of an enemy state. Wills J.—and this is the only part of the judgment in that case to which I think it useful to refer—with characteristic cogency said (2): " It is sufficient for me to say that throughout the " argument I have never been able to comprehend how an act " of treason could give any sort of rights, or could exempt a " person from criminal responsibility for subsequent acts of " treason. If Mr. Shee's argument were sound, an army might, " if each member of it were individually to accept letters of " naturalization from the enemy, desert in the hour of battle " without rendering any of its members liable to the penalties " of treason." The facts in *Lynch's* case were the converse of the facts in this case, but it illustrates the necessity for caution in treating of changes of nationality.

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(1) This case was heard in camera and has been reported with the leave of the court, the facts being taken from the judgment.

In *Rex* v. *Knockaloe Camp Commandant* (3), Avory J. said, referring to *Liebmann's* case (4): " The applicant was born in " Germany in 1868, lived there until 1889, when he came to " England, where he stayed until 1915. In 1890 he obtained a " document purporting to discharge him from German " nationality, but he took no steps to naturalize himself in this " country. He protested against his internment on the " ground that he had ceased to be of German nationality. " His application for exemption from internment was refused, " and he was therefore placed in the same position as was the " present applicant when his exemption was cancelled. Both " the Judges in the Divisional Court expressly held that " Liebmann was an alien enemy, and was therefore not entitled " to apply for a writ of habeas corpus. That decision has been " approved by the Court of Appeal."

I read that not because the authority is needed, it being conceded that an enemy alien is not in a position to apply for

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(1) [1903] 1 K. B. 444.

(2) Ibid. 459.

(3) (1918) 87 L. J. (K. B.) 46.

(4) [1916] 1 K. B. 268.

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a writ of habeas corpus, but to illustrate the proposition which Mr. Brown, on behalf of the applicants, asks us to accept. It is that an enemy alien can throw off his disability by relying on a German law which, in time of war, purported to change his status from that of an enemy alien to that of a stateless person. My reply is that such changes of nationality are not recognized for very obvious reasons. If such changes were to be permitted in time of war enemy agents might acquire facilities which could be used in a way very much to the prejudice of this country. It was pointed out in *Liebmann's* case that war is waged nowadays not merely by armies in the field, but by agents in the heart of the enemy country, and to recognize changes of nationality in time of war, which might operate to the prejudice of this country, is to do something which, even if it is necessary to put it on the grounds of public policy, ought not to be done.

I have, therefore, no hesitation in saying that the change of nationality relied upon by the applicants as entitling them to make this application is one which these courts will not recognize.

That being so it is not necessary to go into the circumstances which have been detailed to us as to the detention of the applicants at the Port-of-Spain in Trinidad. Whatever may be the rights or the wrongs of the question that has been raised, there is an impediment at the very outset of the applicants' motion, namely, that they being enemy aliens, and retaining their status of enemy aliens notwithstanding the German decree, are not in a position to apply for a writ. I think, therefore, that the motion should be refused.

HUMPHREYS J. I am of the same opinion and for the same reasons.

WROTTESLEY J. I agree and for the same reasons.

Application dismissed.

Solicitors for applicants: *Waller, Neale & Houlston, for Marsh & Ferriman, Worthing.*

Solicitor for respondent: *Treasury Solicitor.*

A. W. G.

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Oct. 11.

Lord Greene M.R., MacKinnon and Lawrence L.JJ.

Emergency legislation—War injury—Death—Claim by dependant—Not within scheme made by Minister—Right of action—Personal Injuries (Emergency Provisions) Act, 1939 (3 *&* 4 *Geo.* 6, *c.* 82), s. 3, *sub-s.* 1; s. 8, *sub-s.* 1.

The husband of a woman who was killed by an aeroplane negligently flown by a pilot of the Royal Air Force claimed damages for negligence from the pilot under Lord Campbell's Act, and the Law Reform (Miscellaneous Provisions) Act, 1934. Alternatively, he claimed under the Act of 1934 for trespass to the person of the deceased. He was not entitled to claim compensation under the scheme made by the minister under the Personal Injuries (Emergency Provisions) Act, 1939.

Held, (1.) that the definition of "war injuries" in s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, covered fatal as well as non-fatal injuries, and that the deceased's death was caused by a "war injury"; (2.) that there is nothing in the Act to justify cutting down the plain words of s. 3, sub-s. 1, (which takes away the right to claim damages under any statute or contract or at common law in cases of negligence, nuisance or breach of duty occasioning a war injury) to cases where an alternative right to compensation is given by a scheme made by the minister under the Act; (3.) that the sub-section cannot be evaded by basing the claim on trespass instead of negligence since the words "breach of duty" are wide enough to include trespass. The husband's claim failed.

Appeal from Charles J.

The plaintiff sued as the administrator of his wife, Clara Jane Billings, for damages for negligence under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934, and, alternatively, under the Act of 1934 for trespass to the person. At the time of her death, Mrs. Billings was a land worker earning 35*s*. a week, which she contributed to the family fund. She was killed on March 20, 1942, by being struck, while at work, by the wing of an aeroplane negligently piloted by the defendant, a member of the Royal Air Force. At the trial negligence was admitted, and the only defence relied on was that damages were not recoverable by reason of s. 3, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939 (1).

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(1) By Personal Injuries (Emergency Provisions) Act, 1939, s. 1, sub-s. 1: "The Minister may "make a scheme . . . providing "for the making of payments in "respect of the following injuries "sustained during the period of "the present emergency, namely— "(*a*) war injuries sustained by "gainfully occupied persons (with "such exceptions, if any, as may "be specified in the scheme)

Charles J. found that Mrs. Billings died as the result of a "war injury" as defined by the Act, but that, as the plaintiff was not entitled to claim under the scheme formulated by the minister, the Act did not apply. He gave judgment for the plaintiff for 200*l.* damages under Lord Campbell's Act and 250*l.* under the Law Reform (Miscellaneous Provisions) Act. The defendant appealed, and the plaintiff cross-appealed against so much of the judgment as held that Mrs. Billings' death was caused by a war injury.

". . . and by persons of such "other classes as may be so "specified."

Section 1, sub-s. 2: "In respect "of any such injury, a scheme "may authorise the Minister, in "such circumstances and subject "to such conditions as may be "specified in the scheme, to make "the following payments to or in "respect of the person injured, "namely . . . . (*b*) payments by "way of pension or grant, which "shall be payable only where the "injury causes serious and pro-"longed disablement or death."

Section 3, sub-s. 1 "In respect "of a war injury sustained during "the period of the present emer-"gency by any person, . . . no "such compensation or damages "shall be payable, whether to the "person injured or to any other "person, as apart from the pro-"visions of this subsection "(*a*) would be payable under the "Workmen's Compensation Acts, "1925 to 1938, or the Employers' "Liability Act, 1880 . . . ; or "(*b*) would, whether by virtue of "any enactment, by virtue of any "contract, or at common law, be "payable—(i.) in the case of a "war injury, by any person; ". . . on the ground that the "injury in question was attri-"butable to some negligence, "nuisance or breach of duty for "which the person by whom the "compensation or damages would "be payable is responsible."

Sub-section 2: "The failure to "give a notice or make a claim or "commence proceedings within "the time required by any enact-"ment shall not be a bar to the "maintenance of proceedings in "respect of any personal injury, "if—(*a*) an application for a pay-"ment under a scheme, or under "any other enactment or instru-"ment, has been duly made to "the Minister in respect of the "injury; and (*b*) the court ". . . is satisfied that the said "application was made in the "reasonable belief that the in-"jury was such that a payment "could be made under the scheme "or that other enactment or "instrument, as the case may be; "and (*c*) the Minister certifies that "the application was rejected ". . . . on the ground that the "injury was not such an injury; "and (*d*) the proceedings are "commenced within one month "from the date of the said certifi-"cate of the Minister."

Section 8, sub-s. 1: "'War in-"juries' means physical injuries ". . . . (*b*) caused by the impact "on any person or property of any "enemy aircraft, or any aircraft "belonging to . . . . His Majesty ". . . . or any part of, or any-"thing dropped from, any such "aircraft."

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Sir David Maxwell-Fyfe S.-G. and *A. P. Marshall* for the defendant. Section 3, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, is in such plain terms that very compelling language would be needed to limit it. The Act has two purposes: first, the provision of compensation for war injuries; and, secondly, the relief of individuals from liability which might otherwise fall on them in respect of such injuries. This Act takes compensation for war injuries out of the category of damages and puts it in the sphere of pensions and allowances. The scheme made by the minister could have provided for this case, but it did not do so. The sanction for that is a political sanction, in the minister's responsibility to Parliament, not by recourse to the courts on the part of those for whom the scheme does not provide. Their rights have been taken away by statute. There is some support for this view in the dicta of Scott L.J. in *Adams* v. *Naylor* (1) and in the Scottish case of *Carlin* v. *Donaldson Atlantic Line* (2). The claim in trespass was never mentioned in the court below, and we reserve argument on it till we have heard the plaintiff's case. With regard to the cross-appeal, it is clear from s. 1, sub-s. 2 (*b*), that fatal accidents are within the ambit of the Act, and Charles J. was right in holding that this was a war injury.

Ward K.C. and *Elborne* for the plaintiff. One of the constitutional rights of the subject is that, if wrong be done him, he may come to the King's courts for redress. If that right is to be taken away, the Act must clearly state it, and this Act does not do so. The purpose of the Act and of the minister's scheme was to transfer liability from the individual to the State, not to abolish the rights of the injured party: see the preamble to the Act. Unless the minister includes a person in his scheme so that he can look to the State to compensate him, there is nothing in the Act to put an end to his pre-existing rights. If that had been the intention it would have been easy to frame apt words to carry it out. It was open to the judge to say that the facts were equally consistent with trespass to the person as with negligence. Here there was a trespass to the person, and that does not come within s. 3, sub-s. 1. In any event, the claim for funeral expenses is not a claim for war injury. They are a direct loss to the estate. As to the cross-appeal, this was not a war injury. Death does not come within the definition

(1) [1944] K. B. 750.

(2) 1943 S. C. 172.

of physical injury. The Act deals with pensions and allowances to the injured person himself.

Sir David Maxwell-Fyfe S.-G. was not called on to reply.

LORD GREENE M.R. The question which arises at the outset is whether the injury which caused the instantaneous death of the deceased woman is a war injury within the meaning of the Act. If it is not, no question can arise about the exclusion of the claims in the present case, for the ordinary remedies are not excluded by the Act.

The object of the plaintiff's cross-appeal is to establish the proposition that this was not a war injury within the meaning of the Act because death resulted. In my opinion, that argument cannot be sustained. It seems to me clear beyond possibility of doubt that the circumstance that death ensues from injury does not make that injury any the less a " war injury " than it would have been if the person injured had survived. One would not expect to find any such distinction drawn, for it would be quite anomalous and produce the most extraordinary results, and the language of the Act makes the matter clear beyond question. By s. 1, sub-s. 2, of the Act, the scheme which the minister is to make under the Act may authorize him to make payments of specified classes, one of which, in para. (*b*), is " payments by way of pension or grant, which shall be payable " only where the injury causes serious and prolonged disable- " ment or death." To what do the words " the injury " in that paragraph refer ? Clearly they refer back to the words at the beginning of the sub-section : " In respect of any such " injury." To what do the words " such injury " in that phrase refer ? They refer back to the injuries mentioned in sub-s. 1, which are war injuries, and a " war injury " means a physical injury. Accordingly, para. (*b*), if it is written out at length without shortening it referentially as it is shortened by the draftsman, would read as follows : " payments by way of " pension or grant, which shall be payable only where a war " injury causes death, and a war injury is a physical injury." Those considerations appear to me to dispose of the argument conclusively.

I must now turn to the language of the section which affects the other questions in the case. Putting it shortly, the broad effect of s. 3, sub-s. 1, read according to its ordinary meaning, appears to me to be that in the case of war injuries all rights to sue in tort or for breach of contract, or to claim under the

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Workmen's Compensation Act or any other enactment, are taken away where the injury in question is a war injury and the cause of action is based on some negligence, nuisance or breach of duty. That, again, for the sake of complete accuracy, must be qualified by remembering that the right to claim under the Workmen's Compensation Act is expressly excluded, and the words "attributable to some negligence, nuisance or breach "of duty" do not apply in that separate case. Pausing there for a moment, it may be said (and the argument at first sight seems attractive) that it would be remarkable for Parliament to take away a man's legal rights and give him nothing in exchange and, therefore, there is a natural inclination to construe this abrogation of rights as not extending to cases where no alternative right is conferred under the scheme contemplated by the Act. In the present case, although unquestionably the plaintiff had rights under the Law Reform (Miscellaneous Provisions) Act, and under Lord Campbell's Act, he has no rights under the scheme, which does not enable a widower to claim under it unless he was the dependent husband of his wife at the date of her death, incapable of self-support, and in need. It is obvious that many widowers who could have claimed under Lord Campbell's Act are unable to satisfy the stringent conditions laid down by this scheme, and the present is such a case. If the defendant's contention is right, the present plaintiff has lost the rights he would have had under Lord Campbell's Act and got nothing in exchange under the scheme. So far as any claim under the Law Reform Act is concerned the plaintiff is claiming in right of his deceased wife and in respect of the tort committed against her. There again, there is no provision in the scheme under which the estate of the deceased wife in her right can make any claim in such circumstances as these.

It is said that to construe the language of this Act in a way which will involve the deprivation of injured persons of their common law or statutory rights in cases where the scheme does nothing for them would be a very grave matter, and, if possible, the courts should avoid putting such a construction on the language used. That argument, as I have already said, at first sight sounds attractive. Broadly speaking, one may say that the court does not construe an Act of Parliament as depriving a person of his normal rights as a subject unless clear language is used, and where that would be the effect of an Act it has often been held in ordinary cases, that a comparatively slight context is sufficient to justify the court in construing the language in the opposite sense. In the present case, however, it seems to me that there are certain broad considerations which, far from leading to a displacement of the prima facie meaning of the words now under consideration, actually confirm it, or, at any rate, indicate the strong probability that the legislature intended precisely what it has said. The legislature was confronted with a situation in which injuries arising out of war conditions might affect the civil population in a very extraordinary and unusual degree, and it appears to have taken the view that neither existing statutes nor, in some cases, existing contracts ought to be regarded as having contemplated anything of that kind. Therefore, the scheme of this legislation was to lift that class of injury right out of the common law and existing legislation, including the Workmen's Compensation Act, and to give it special treatment. That seems to me to be, not unjust, but a very sensible and business-like way of handling a totally unprecedented situation. The legislature, in effect, says that no existing legislation is to apply in the case of war injuries, however caused, but they are to be treated as a special class of injury outside the intention and scope of previous legislation which has not contemplated any such thing. Compensation or provision for such injuries is to be made only under the terms of a scheme of pensions and allowances to be settled by the minister with the approval of the Treasury, subject to the usual control of Parliament. I cannot find in such a conception anything extravagant. It seems to me to be both reasonable and just.

Therefore, looking at the general scope of the Act and the purpose shown on the face of it, I do not find any context which would justify me in writing a gloss or a qualification into the clear language of s. 3, sub-s. 1, which in terms takes away the plaintiff's right of action. Is there any other context which might be useful for the purposes of the plaintiff's argument? What is pointed to is sub-s. 2, of s. 3, which deals with cases where a claimant is entitled to make a claim under some scheme or enactment or instrument, but fails to make it in time because he has mistakenly endeavoured to claim under a scheme made pursuant to the Act. It is a procedural sub-section, and the way in which it operates can be shown by a simple example. A man who has suffered an injury which he believes to be a war injury makes a claim under the scheme, and the minister rejects it. Provided he takes within one month the proceedings which, the injury not being a war injury, he is entitled to take, the fact (if so it be) that he would otherwise be out of time is not to prejudice him. That is the sole object of sub-s. 2. It is purely procedural, and is intended to preserve the rights of a man who has made a mistake by claiming in the wrong quarter.

Then it is said that, if the only case where a man could be in such a position is where he alleges a war injury and it turns out not to be a war injury, why does not the sub-section say so? The sub-section refers to an application " made in the reason-" able belief that the injury was such that a payment could " be made under the scheme." It is suggested that, if the defendant's construction of the Act is right, those words ought to have been " in the reasonable belief that the injury was a " war injury." That argument is not one, I think, which carries any weight, for the simple reason that the rather longer phrase which the draftsman has used—" in the reasonable belief " that the injury was such that a payment could be made " under the scheme "—was due to the fact that he had to find a form of words which would cover not merely mistaken claims under the scheme of this Act, but mistaken claims under " any other enactment or instrument " as is mentioned in this sub-section. I cannot extract from s. 3, sub-s. 2, any such context as would justify me in cutting down the clear language of s. 3, sub-s. 1.

The fact that the object of this Act was in substance what I have suggested can be seen from a consideration of the way in which the scheme has been framed pursuant to the Act itself and with the tacit approval of Parliament as provided in the Act. At any rate, we are entitled to look at the scheme for the purpose of seeing the kind of practical treatment of these questions which Parliament has authorized. It will then be found, I think, that the proposition for which Mr. Ward, on behalf of the plaintiff, has contended is unarguable. Let me take two examples, although many others could be found. One example is to be found in cl. 60, sub-para. 2, of the scheme, under which the minister, in the case of a person who, in his opinion, is unworthy of a grant from public funds, can either withhold the award of a pension or can direct that it be forfeited. It would follow, therefore, according to the argument that an unworthy person from whom a pension has been withheld could go to the court and say: " section 3, sub-s. 1, does " not apply to me because that is limited to cases where the "person in question is entitled to claim a pension, and, therefore, my common law or statutory rights are not taken away "from me, and I am entitled to maintain my action." That would be a remarkable result because it might well be that the person whom the minister regards as unworthy of a grant from public funds could put himself into a far better position than the worthy person to whom a pension has been awarded under the scheme. The matter does not end there. What is to happen if a person has been awarded a pension which is subsequently stopped because he is considered to be unworthy? According to Mr. Ward—and I think that logically he is driven to the position—directly the pension is stopped that person's common law or statutory rights revive and he can claim in respect of them unaffected by this legislation. That, again seems to be a curious result.

The other example to which I should like to refer is the case where the injury was caused or contributed to by the serious negligence or misconduct of the person injured. That is referred to in cl. 6 of the scheme, and in such a case the minister may withhold, cancel or reduce the award. Take the case of a workman who is injured in such circumstances as to bring that discretion of the minister into operation, and the minister decides not to make an award to him under the scheme. That decision, according to the argument, entitles the workman to claim under the Workmen's Compensation Act, provided that the case is one of those under that Act where, notwithstanding the serious misconduct of the workman, he is still entitled to recover. Those examples show the type of case which may arise. It is sufficient to put the position under the scheme in contrast with the position as it would be if the plaintiff's contention is right to see that the policy of the legislature was much more likely to have been what I have suggested it was, than that which is attributed to it by the plaintiff.

That, I think, is all I have to say on the main part of this appeal, but there are two minor arguments on which I must say a few words. First, it is said by Mr. Ward that his claim was laid in trespass as well as in negligence, and he suggests that s. 3, sub-s. 1, does not bar a claim in trespass. He takes the words in sub-para. (*b*), "on the ground that the injury in "question was attributable to some negligence, nuisance or "breach of duty," and says: "If I claim in trespass I am not "putting my case on the ground that the injury was attributable to any of those three things, because trespass is not "negligence, trespass is not nuisance, and trespass is not "breach of duty." I am unable to accept that proposition. It would appear to limit the words "breach of duty" to cases of breach of duty to take care, which is the same thing as negligence. It seems to me that in this context the phrase "breach of duty" is comprehensive enough to cover the case of trespass to the person which is certainly a breach of duty as used in a wide sense. If that view be not right, it would be easy to get round this sub-section, because the plaintiff would only have to frame his action on the ground of trespass to the person, saying no word about negligence, and he could avoid the effect of the sub-section altogether. That cannot possibly be the true position.

The other point is a quite minor one. Mr. Ward says that, whatever the effect of the statute may be in respect of the rest of his claim, it does not preclude his client, as executor of the deceased, from claiming for the funeral expenses which the estate has had to defray. In my opinion, there is nothing whatever in that point. Funeral expenses in a claim under the Law Reform Act are merely an item of damage which the statute regards as flowing from the cause of action which the deceased person had, and which, by the statute, is preserved to the executor on the death of the deceased. It is not a separate claim, but merely a head of damage in respect of the one and only cause of action. In the result, in my opinion, the judgment cannot stand, and the appeal must, accordingly, be allowed.

MACKINNON L.J. I agree. The only possible argument by which the judgment of Charles J. can be supported with any show of plausibility must be based on s. 3, sub-s. 2, of the Act. That seems to contemplate that where an application has been made to the minister under the scheme and has been rejected, proceedings in the courts can then be taken if commenced within one month from the minister's decision. It is contended that that shows that, if no allowance or pension can be obtained under the scheme, a right of action may be pursued in the courts, the right of action not being barred by s. 3, sub-s. 1, but I think that is quite an untenable argument. The words of s. 3, sub-s. 1, are clear and unambiguous. They are, putting it shortly, that in respect of a war injury there shall be no enforceable claim in the courts. I think that sub-s. 2 only deals with cases where there has been a failure to obtain an

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allowance under the scheme because the injury was not a war injury. That seems to be indicated by the whole of the section, and, in particular, by the words in sub-cl. (*c*) of sub-s. 2: "the minister certifies that the application was rejected, or "that payments made in pursuance of the application were "discontinued, on the ground that the injury was not such an "injury." "Was not such an injury" seems to me clearly to mean "was not a war injury." Section 3, sub-s. 1, only puts an end to claims in respect of war injuries. It has no operation with regard to an injury which is not a war injury. Section 3, sub-s. 2, seems to me only to be inserted to guard against the possible effect of delay in bringing a suit which is not barred by sub-s. 1, because it is not in respect of a war injury, the delay being caused by the mistaken belief of the claimant that his injury was a war injury. I agree that the decision was erroneous, and this appeal must be allowed.

Lawrence L.J. I agree.

Appeal allowed; cross-appeal dismissed.

Solicitor for defendant: *Treasury Solicitor.*

Solicitors for plaintiff: *W. H. Thompson, for Williams & Co., Peterborough.*

J. W. H.

1944
May 24.
Lawrence J.

REX *v.* REYNOLDS.

Criminal Law—Coroner's inquisition—Committal—Power of trial judge to quash—Coroners Act, 1887 (50 & 51 *Vict., c.* 71), *s.* 6.

A judge of assize has jurisdiction at common law to quash a coroner's inquisition on which a person stands charged before him if the proceedings at the inquest are proved to have been irregular.

Motion to quash a coroner's inquisition, charging Prudence May Reynolds with manslaughter at Dorset Assizes. There was no committal by justices.

The grounds for the motion, based on affidavits filed on behalf of the accused, were that the proceedings before the coroner were irregular in that (inter alia) the coroner had on two occasions had private conversation with a member of the jury. It also appeared that he in his professional capacity as a solicitor was acting in proceedings against the accused.

Scott Henderson in support of the motion. If an indictment is not properly presented it may be quashed, even if good on the face of it—*Reg.* v. *Heane* (1) where there was non-compliance with the provisions of the Vexations Indictments Act, 1859, relating to the binding over of the prosecutor to prosecute—and that, too, by the judge before whom it is to be tried; *Rex* v. *Gee* (2) where there was an irregularity in taking the depositions. There is no difference in this respect between an indictment and an inquisition. In the present case the coroner committed a grave irregularity in talking to an individual member of the jury—see *Rex* v. *Wood* (3). By reason of this irregularity there is a real risk that justice has not been done: *Rex* v. *Divine* (4).

Maitland Walker for the Crown. It is not contended that, generally speaking, there is any distinction between a coroner's inquisition and an indictment: *Reg.* v. *Ingham* (5); Archbold's Criminal Pleading (31st ed.) 108. Both can be quashed if not properly presented. But in the case of an inquisition this can only be done by a Divisional Court, and, in any event the fiat of the Attorney-General on an application to quash must be obtained. [*Reg.* v. *Heane* (1) and s. 6 of the Coroners Act, 1887, were also referred to.]

LAWRENCE J. On the authority of *Reg.* v. *Heane* (1) and *Rex* v. *Gee* (2) I am of opinion that I have jurisdiction at common law to quash this inquisition in the same way as I have jurisdiction to quash an indictment. In *Rex* v. *Gee* (2) the procedure laid down in the Vexations Indictments Act, 1859, for the preliminary investigation of a charge before committing justices had not been complied with, and the Court of Criminal Appeal overruled the recorder who had refused to quash the indictment on the ground that he had no jurisdiction to do so. The Court of Criminal Appeal thus clearly decided that where provisions laying down the procedure to be followed before the committing justices had been disregarded, the indictment which proceeded on that basis ought to be quashed by the court before whom it was brought. In the present case the last ground on which it is contended that this inquisition ought to be quashed is that there were irregularities in connexion with the proceedings

(1) (1864) 4 B. & S. 947.
(2) [1936] 2 K. B. 442.
(3) [1928] 1 K. B. 302.
(4) [1930] 2 K. B. 29.
(5) (1864) 33 L. J. (Q. B.) 183.

at the inquest which, taken with the mode of obtaining the verdict of the jury and the slender nature of the evidence, make the quashing of the inquisition right in the interests of the administration of justice. It is alleged by the foreman of the coroner's jury that the coroner had two conversations with him which were in substance private conversations and not conversations between the coroner and the whole jury. The coroner denies that the second conversation took place, and I think that the foreman was mistaken about what he thought the coroner said, but it does appear that conversations did take place in undesirable circumstances, that is to say, there were observations made by the coroner to a single member of the jury. It also appears that the coroner's firm (he being a solicitor) had had correspondence with regard to legal proceedings against the defendant. It is clear from *Rex* v. *Wood* (1) and *Rex* v. *Divine* (2) that where a coroner has been guilty, even though innocently, of conduct which is considered improper, the inquisition is invalidated. For instance, in *Rex* v. *Wood* (1) the coroner had gone with the jury into the room where they retired to consider their verdict, and that was held to have invalidated the inquisition although it was not suggested that the coroner had intended to do anything improper or that he had said anything which he ought not to have said. It was merely the fact that he had gone into a room which ought to have been private to the jury and discussed the case with them. Similarly, in *Rex* v. *Divine* (2), where before the hearing of the inquest, the coroner had shown a juryman one of the exhibits which was produced at the hearing, the general principle was adhered to that it is hardly more important that justice should be done than that it should appear to be done.

Having regard to the whole of the facts, I think the inquisition must be quashed, and that I have power to quash it at common law without the fiat of the Attorney-General under s. 6 of the Coroners Act, 1887.

Inquisition quashed.

Solicitors for defendant: *E. W. Marshall Harvey & Dalton, Bournemouth.*

Solicitor for Crown: *C. P. Brutton, Dorchester.*

(1) [1928] 1 K. B. 302. (2) [1930] 2 K. B. 29.

W. L. L. B.

Distinguished. HILL v. LUTON CORPN. [1951] 2 K. B. 387

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Oct. 2, 3, 13.

Lord Greene M.R., Lord Goddard and du Parcq L.J.

BATTERSBY AND OTHERS *v.* ANGLO-AMERICAN OIL COMPANY, LIMITED, AND OTHERS.

Practice—Writ—Service—Failure to serve within twelve months—Extension of time—Discretion of court—R. S. C., Or. 8, r. 1; Or. 64, r. 7.

The court will not exercise its discretion in favour of the renewal of a writ after the period allowed for service has expired, nor allow an amendment of pleadings to be made, if the effect of doing so will be to deprive a defendant of the benefit of a limitation which has accrued.

Holman v. *George Elliot & Co., Ld.* [1944] K. B. 591 not followed.

APPEAL from Birkett J.

On October 20, 1941, Albert Victor Battersby was killed by an explosion at the works of the first defendants. The plaintiffs, his widow and children, took proceedings under the Fatal Accidents Act, 1846. On October 19, 1942, a writ was issued, but it was not served within the twelve months required by R. S. C., Or. 8, r. 1 (1) On January 18, and May 22, 1944, applications for renewal of the writ were made to a master who refused to grant leave. On May 23, 1944, the plaintiffs

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(1) By R. S. C., Or. 8, r. 1: "No "original writ of summons shall "be in force for more than "twelve months from the day of "the date thereof, including the "day of such date; but if any "defendant therein named shall "not have been served therewith, "the plaintiff may, before the "expiration of the twelve months, "apply to the court or a judge for "leave to renew the writ; and "the court or a judge if satisfied "that reasonable efforts have "been made to serve such defendant, or for other good reason, "may order that the original ". . . writ of summons be renewed for six months from the "date of such renewal inclusive, "and so from time to time "during the currency of the renewed writ . . . and a writ of "summons so renewed shall remain in force and be available "to prevent the operation of any "statute whereby the time for "the commencement of the action "may be limited, and for all "other purposes, from the date of "the issuing of the original writ "of summons."

By Or. 64, r. 7: "The court or a "judge shall have power to "enlarge or abridge the time "appointed by these rules . . . "for doing any act or taking any "proceeding, upon such terms "(if any) as the justice of the case "may require, and any such enlargement may be ordered although the application for the "same is not made until after the "expiration of the time appointed "or allowed . . . ."

[Reported by F. R. R. BURFORD, Esq., Barrister-at-Law.]

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appealed to Stable J. who granted leave to renew the writ for six months from October 18, 1943, and for a further six months from the expiration of that period, this order being made subject to any application to set aside the writ. In June, 1944, the writ was served on the defendants who entered a conditional appearance. On June 22, 1944, an application to set aside the writ was made to Master Baker, who ordered that the writ and the service thereof be set aside on the ground that at the time of the renewal of the writ the plaintiffs' cause of action under the Fatal Accidents Act, 1846, had expired. On June 27, 1944, the plaintiffs appealed to Birkett J., who allowed the appeal and directed that the order of Master Baker should be rescinded and that the order of Stable J. granting leave to renew the writ should stand. From this order of Birkett J. some of the defendants appealed.

Valentine Holmes for the first three defendants who appealed. The effect of the order of Birkett J. renewing the writ against these three defendants was to deprive them of their defence that the action against them was barred by s. 3 of the Fatal Accidents Act, 1846, which provides that an action under the Act must be commenced within twelve calendar months after the death caused by the wrongful act, neglect or default. Where an original writ of summons has been in force for more than twelve months without being renewed it is no longer in force and is a nullity: R. S. C., Or. 8, r. 1; but by virtue of what is now Or. 64, r. 7, there is normally power to renew it after the expiration of that period of twelve months: *In re Jones, Eyre* v. *Cox* (1). The court, however, will never exercise this discretion when its exercise will defeat the vested rights of a defendant to plead a statute of limitations: *Doyle* v. *Kaufman* (2). The Court of Appeal in that case (Bramwell, Brett and Cotton L.JJ.) intimated that the principle laid down by the Divisional Court (Cockburn C.J. and Lush J.) was right, though they dismissed the application on another ground (3). In *Smalpage* v. *Tonge* (4) the court gave leave for the issue of a concurrent writ for service out of the jurisdiction notwithstanding that the enlargement of time for issuing a concurrent writ might affect the operation of the Statute of Limitations, but in that case the original writ issued for service within the jurisdiction had been renewed from time to time under Or. 8, r. 1, and so was always effective. Cotton L.J., referring to *Doyle* v. *Kaufman* (1), said (2): "There the right of action was gone " . . . . Here the right of action still continues, and we are " only asked to make the action effectual by ordering service " out of the jurisdiction." In *Hewett* v. *Barr* (3), *Doyle* v. *Kaufman* (1) was followed, Lopes L.J. saying: " In my " experience, the practice as laid down in that case has been " followed ever since." (4). It is true that Kay L.J. said that he was disposed to think that Or. 64, r. 7, might be construed to give the court power to grant an application to renew the writ after its twelve months' currency, although the period of limitation had in the meantime expired, where it was proved that every effort had been made to serve the writ and by accident or mistake no application for renewal had been made within the year (5), but it is plain that Kay L.J. would not have affirmed the order of Birkett J. in this case. If a statute of limitations would be defeated, the court will not allow a person to be added as plaintiff: *Mabro* v. *Eagle Star and British Dominions Insurance Co., Ld.* (6); or a pleading to be amended by setting up fresh claims then barred: *Weldon* v. *Neal* (7); *Marshall* v. *London Passenger Transport Board* (8). All authority up to the present year shows that the court has no discretion to renew a writ after its currency of twelve months when the effect will be to deprive a defendant of his defence under a statute of limitations, or, alternatively, that, if there be such a discretion, it will only be exercised in exceptional circumstances, such as where there has been accident or mistake or perhaps where the default has been induced by the conduct of the defendant. In *Holman* v. *George Elliot & Co., Ld.* (9) the writ under the Fatal Accidents Act, 1846, was issued on October 7, 1942, two days before the expiration of the twelve months from the date of the accident. This writ was renewed by Stable J. under Or. 64, r. 7, after its twelve months' currency had elapsed and his order was upheld by the Court of Appeal, MacKinnon L.J. expressing the opinion that Stable J.'s order had not deprived the defendants of an accrued right of defence under the Fatal Accidents Act, 1846. It is submitted that this is not so, since the writ became a nullity twelve months after October 7, 1942, and, therefore, the defendants' remedy was barred under s. 3 of the Fatal Accidents Act, 1846. If the writ ceases to be in force the position is the same as if it had never been issued. If that was not so there would be no reason for the words in Or. 8, r. 1: "a writ . . . so renewed shall "remain in force and be available to prevent the operation "of any statute whereby the time for the commencement "of the action may be limited, and for all other purposes, "from the date of the issuing of the original writ of summons." The decision in *Holman* v. *George Elliot & Co., Ld.* (1) is in conflict with all earlier authority and with other decisions of the Court of Appeal.

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(1) (1877) 25 W. R. 303.

(2) (1877) 3 Q. B. D. 7.

(3) (1877) 3 Q. B. D. 340.

(4) (1886) 17 Q. B. D. 644.

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(1) 3 Q. B. D. 7.
(2) 17 Q. B. D. 648.
(3) [1891] 1 Q. B. 98.
(4) Ibid. 99.
(5) Ibid 99, 100.
(6) [1932] 1 K. B. 485.
(7) (1887) 19 Q. B. D. 394.
(8) (1936) 80 Sol. J. 893.
(9) [1944] K. B. 591.

Scott Cairns and *Mitchison* for other defendants adopted the arguments of *Holmes*.

Sandlands K.C. and *Geoffrey Howard* for the plaintiffs. By the express terms of Or. 64, r. 7, Birkett J. had a complete discretion to enlarge the time for renewing this writ. The short judgment in *Doyle* v. *Kaufman* (2) can mean no more than that the court ought not to have exercised its discretion to enlarge the time for renewal of the writ in that case. In *Monk* v. *Redwing Aircraft Co., Ld.*, Lord Greene M.R. said (3): "It is right, perhaps, to make the general observation that "the Rules of Court when they confer a discretion on a judge "give it in accordance with their language. Rules of practice, "it is true, grow up and justify themselves as indicating "that in the ordinary case judicial discretion will not be "exercised in a particular way, but no such rule of practice "can be binding where complete discretion is given, and if a "judge considers that an order should be made in the special "circumstances of the case before him, he is certainly not "bound to follow rules of practice of that kind." The Court of Appeal should not interfere with the discretion of Birkett J. acting within his jurisdiction merely because they would have exercised the discretion in a different way: see the speech of Viscount Simon L.C. in *Charles Osenton* v. *Johnston* (4) and that of Lord Wright in *Evans* v. *Bartlam* (5). Lastly, an original writ of summons, notwithstanding the expiration of the twelve months specified by Or. 8, r. 1, and even though not renewed under that rule, still continues effectual for all purposes, except that of service: *In re Kerly, Son and Verden* (1).

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(1) [1944] K. B. 591.
(2) 3 Q. B. D. 7.
(3) [1942] 1 K. B. 182, 188.
(4) [1942] A. C. 130, 138.
(5) [1937] A. C. 473, 486.

Holmes replied.

Cur. adv. vult.

Oct. 13. The judgment of the court was read by LORD GODDARD. On October 20, 1941, Albert Victor Battersby, the husband of the first plaintiff and father of the others, who was employed by the defendants, Simmons and Hawker, Ld., was killed by an explosion at the works of the first defendants. What connexion the other defendants had with the matter has not appeared in the proceedings out of which the present appeal arises, nor is it necessary, at the present stage, to go into this matter. On October 19, 1942, the writ in the action was issued. In the opinion of the court this writ covers, and was only intended to cover, a claim under the Fatal Accidents Act, 1846, and does not include any claim by the administratrix under The Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the loss sustained by the deceased of his expectation of life. This writ was not served on any of the defendants during the ensuing twelve months, but on January 18, 1944, an application for its renewal was made to a master and was refused. On May 2, 1944, judgment was given by this court in *Holman* v. *George Elliot & Co., Ld.* (2), and it was, no doubt, because of that decision, that the plaintiff again applied for a renewal of the writ. This application was heard and refused by Master Baker on May 22, 1944. The next day the plaintiff applied to Stable J. by way of appeal from this refusal, and on that day the judge renewed the writ. The effect of his order was to renew the writ for six months from October 18, 1943, and for a further six months from April 17, 1944. Orders for renewal are necessarily made ex parte, and, accordingly, the defendants, on being served, followed the correct procedure of entering a conditional appearance and applying to set aside the writ and service. Again this application came before Master Baker, who set the writ aside, but, on appeal, Birkett J. reversed his order. The form of the judge's order was that the appeal be allowed, the order of the master be rescinded, and the order of Stable J. giving leave to renew the writ was to stand. The effect of the order was to render the appearance unconditional. It is from this order that some of the defendants appeal. Their contention is that it was wrong to

(1) [1901] 1 Ch. 467.

(2) [1944] K. B. 591.

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renew the writ in this case because the effect of so doing is to deprive them of the defence that the action is barred by the provision in s. 3 of The Fatal Accidents Act, 1846, which provides that : " Every such action "—i.e., an action given by the Act—" shall be commenced within twelve calendar " months after the death of such deceased person."

The period during which an unserved writ is effective and provisions for its renewal are dealt with by R. S. C., Or. 8, r. 1. Rule 2 provides that the production of a writ showing the same to have been renewed shall be sufficient evidence of its having been so renewed and of the commencement of the action as of the first date of such renewed writ for all purposes. It will have been seen that the writ in the first place was issued within the period allowed by the statute, but no application to renew it was made within twelve months from the date of issue. So when Stable J. renewed the writ, not only had the time for renewal expired, but more than twelve months had elapsed since the death of the deceased. The plaintiffs, however, contend, and in this have the support of the decision in *Holman* v. *George Elliot & Co., Ld.* (1), that the court has a discretion under Or. 64, r. 7, to enlarge the time for renewing the writ, and that it was, accordingly, open to Stable J. to renew the writ notwithstanding that the application was made more than twelve months after the date of issue. That the widest discretion is given to the court under that rule none will deny, but there is a line of authority, unbroken till the recent decision in *Holman's* case (1), that the court will not exercise that discretion in favour of renewal, nor allow an amendment of pleadings to be made, if the effect of so doing be to deprive a defendant of the benefit of a limitation which has already accrued.

Before dealing with the authorities on this point we think we ought to refer to one matter dealt with in the judgment of MacKinnon L.J., in *Holman's* case (1), which was not strictly necessary for the decision, but from which we feel constrained to differ. That, also, was a case under the Fatal Accidents Act, 1846, and, as in the present action, a writ was issued within twelve months of the death, but was not served, and application for renewal was not made within twelve months of the date of issue. Acceding to an argument advanced by the plaintiff, MacKinnon L.J. is reported as saying (2) : " Mr. Fox-Andrews for the plaintiff points out, and I think

(1) [1944] K. B. 591. (2) Ibid. 593.

"with reason, that this is not a case where the order of the "learned judge, in extending the period for the service of the "writ, deprives the defendants of an accrued right of defence "under Lord Campbell's Act. The right of defence by the "limitations section of Lord Campbell's Act would arise if "the writ had not been issued before October 9, 1942. It "was, in fact, issued on October 7, 1942, two days before the "expiry of the twelve months from the date of the accident." With all respect, we are unable to agree that the issue of a writ which has become a nullity by reason of non-service within the prescribed time satisfies the section. If the writ has ceased to be in force the position is the same as if it had never been issued. Otherwise we see no reason for the concluding words of r. 1 of the order which provides for a renewed writ preventing the operation of statutes of limitations. These words would be unnecessary if a writ which had expired and had not been renewed would answer that purpose. A new writ, issued more than twelve months after the date, would clearly be out of time, so either the writ originally issued must be renewed or the action is barred.

We agree, therefore, with the view expressed by both members of the court in *Holman's* case (1), that the real question which arose there (and it also arises in the present case), is whether there was a discretion in the court to enlarge the time for renewal under Or. 64, r. 7. As we have just said, there is a consistent line of authority that the court will not extend the time in such cases, so as to deprive the defendant of the benefit of the statute. The first case is *Doyle* v. *Kaufman* (2). In the Divisional Court, Cockburn C.J., with whom Lush J. concurred, said (3): "The power to enlarge "the time given by Or. 57, r. 6" (now Or. 64, r. 7) "cannot "apply to the renewal of a writ when, by virtue of a statute, "the cause of action is gone." Perhaps it might have been more accurate to say "when the remedy is barred," but the effect is the same. The report in the Court of Appeal is not as satisfactory as one could wish. It merely says that the court intimated that the principle of the judgment in the court below was right, but dismissed the application on the ground that the plaintiff, who was a solicitor, had himself been guilty of laches, which disentitled him to a renewal. This looks as though the court, while affirming the rule laid down by the

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(1) [1944] K. B. 591.

(2) 3 Q. B. D. 7, 340.

(3) 3 Q. B. D. 8.

Lord Chief Justice in unqualified terms, thought that there might be exceptions to it, as, indeed, did Kay L.J. in a later case to which we shall refer. But whether there can be exceptions or not, there is no doubt what the Court of Appeal held to be the rule.

The next case that was cited was *In re Jones* (1), heard by Sir George Jessel M.R., earlier in the same year, 1877. In that case he renewed the writ after the expiration of twelve months from the date of issue, but it will be observed that no question of limitations arose, nor is there any suggestion that any right of the defendant then existing would be prejudiced. The case is reported, apparently, only because the writ had been amended since issue, and the Master of the Rolls held that the twelve months must be computed from the date of the writ and not from the amendment. That case, therefore, is no assistance to the present proceedings. Then comes *Smalpage* v. *Tonge* (2). There a writ for service within the jurisdiction had been renewed, and, finding that the defendant was out of the jurisdiction, the plaintiff applied for and obtained leave to issue a concurrent writ for service out of the jurisdiction although the enlargement of time for issuing a concurrent writ might affect the Statute of Limitations. In that case, however, the original writ was always alive and effective, and Cotton L.J. pointed out that the court was being asked not to renew a lost cause of action, but only to make the writ effectual by giving leave to serve it abroad, and, as Lindley L.J. observed, the writ had been renewed from time to time, and if the defendant came over here the action could go on without him. The court referred to *Doyle* v. *Kaufman* (3), and obviously approved the decision in that case.

In 1890 came *Hewett* v. *Barr* (4). That case has never been questioned, and, in our opinion, is really conclusive in favour of the present appeal. Lord Esher M.R. laid it down as a general rule of conduct that amendments ought not to be granted where they would have the effect of altering the existing rights of the parties. Then he said: "This being "the rule with regard to amendments of pleadings the same "principle applies still more strongly to the case where we "are asked to allow the renewal of a writ, though by so doing "we should deprive the defendant of his existing right to the

(1) 25 W. R. 303.
(2) 17 Q. B. D. 644.
(3) 3 Q. B. D. 7, 340.
(4) [1891] 1 Q. B. 98, 99.

"benefit of the Statute of Limitations." Lopes L.J. was equally emphatic, and expressly referred to *Doyle* v. *Kaufman* (1). Kay L.J. in concurring, did say that he was disposed to think that Or. 64, r. 7, might be construed to give the court power to do so in exceptional circumstances. He, apparently, thought that in some cases accident or mistake in not applying for renewal within twelve months might be excused. That, however, was not the judgment of the court and can only be regarded as a dictum cautiously expressed. Moreover, the facts in that case were somewhat exceptional. A clerk was unexpectedly detained in court till after 4 o'clock, and then found the office closed when he went to make his application for renewal. He renewed it the next morning, but the court held that he was too late as by then the statute had run. If such circumstances did not avail the plaintiff, it is indeed difficult to see what accident or mistake would, though we do not deny that, if the defendant himself had brought about the delay, as, for instance, by asking the plaintiff to withhold service for some reason, he might well be held disentitled to object to a renewal after the prescribed period had expired. This rule had been applied by the Court of Appeal in *Weldon* v. *Neal* (2) three years previously, a case in which an amendment of pleadings was sought and refused because it would, if allowed, have affected the operation of the statute.

In *Holman's* case (3) the court referred to *Mabro* v. *Eagle Star and British Dominions Insurance Co.* (4), where the court refused to allow a person to be added as a plaintiff to an action if thereby the defence of the statute would be defeated, and did so for precisely the same reasons as were given in the earlier cases which we have set out above. Scrutton L.J. said: "The court has always refused to allow a party or a cause of "action to be added where, if it were allowed, the defence of "the Statute of Limitations would be defeated. The court "has never treated it as just to deprive a defendant of a legal "defence. If the facts show either that the particular plaintiff "or the new cause of action sought to be added are barred, "I am unable to understand how it is possible for the court "to disregard the statute." That, if we may say so, puts the reason underlying the rule clearly and emphatically. In the present case the court is apprised of the fact that the period of limitation had run when the application for renewal was

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(1) 3 Q. B. D. 7, 340.

(2) 19 Q. B. D. 394.

(3) [1944] K. B. 591, 594.

(4) [1932] 1 K. B. 485, 487.

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made. To grant the renewal would, therefore, be to disregard the statute, which no court has a right to do merely because its operation works hardship in a particular case. The passage from the judgment of Greer L.J. cited by the court in *Holman's* case (1) appears to us to be equally conclusive against the present application. In our opinion, what Greer L.J. meant was that, even assuming the words of the particular rule confer a discretion, it is one which can be exercised only in one way if an exercise in the other direction would deprive a party of a legal defence. In making the orders they did, we have no doubt that both Stable J. and Birkett J. were influenced by, and intended to follow, *Holman's* case (1). That is a decision of this court, but, in our opinion, it is in conflict with the earlier cases also decided in the Court of Appeal. Accordingly, in conformity with the decision of the full court in the recent case of *Young* v. *The Bristol Aeroplane Co.* (2), we are at liberty to disregard it, and, in our opinion, we ought to follow the earlier decisions.

We conclude by saying that, even when an application for renewal of a writ is made within twelve months of the date of issue, the jurisdiction given by the rule ought to be exercised with caution. It is the duty of a plaintiff who issues a writ to serve it promptly, and renewal is certainly not to be granted as of course on an application which is necessarily made ex parte. In every case care should be taken to see that the renewal will not prejudice any right of defence then existing, and in any case it should only be granted where the court is satisfied that good reasons appear to excuse the delay in service, as, indeed, is laid down in the order. The best reason, of course, would be that the defendant has been avoiding service, or that his address is unknown, and there may well be others, but ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development. It is for the court and not for one of the litigants to decide whether there should be a stay, and it is not right that people should be left in ignorance that proceedings have been taken against them if they are here to be served. While a defendant who is served with a renewed writ can, no doubt, apply for it to be set aside on the ground that there was no good reason for the renewal, his application may very possibly come before a master or judge other than the one who made the order and who will not necessarily know

(1) [1944] K. B. 591, 594.

(2) [1944] K. B. 718.

the grounds on which the discretion was exercised. The appeal will be allowed, and the writ will be set aside with costs here and below.

Appeal allowed.

Solicitors: *Simmons & Simmons; Berrymans; Coward, Chance & Co.; W. R. Bennett & Co.*

REX *v.* JUSTICES FOR DURHAM.

Ex parte LAURENT.

1944
Oct. 25, 26.

Caldecote C.J.
Humphreys
and
Birkett JJ.

Justices—Jurisdiction—Breach of recognizance—Forfeiture—Conviction of offence—Right of Appeal—Mandamus—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vic., c.* 49), *s.* 9, *sub-s.* 2, *as amended by Criminal Justice Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 26, *sub-s.* 1—*Criminal Justice Administration Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 58), *s.* 37, *sub-s.* 1.

An order of a court of summary jurisdiction forfeiting a recognizance for breach of its conditions is a "conviction" within the meaning of s. 9, sub-s. 2, of the Summary Jurisdiction Act, 1879, as amended by s. 26, sub-s. 1, of the Criminal Justice Act, 1925, but is not a "conviction in respect of an offence" within the meaning of s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, and, therefore, there is no right of appeal to quarter sessions against such an order. The word "offence" in s. 37, sub-s. 1, means such an offence as could be made the subject of a criminal charge.

MOTION for order of mandamus.

On March 23, 1942, the applicant, Cyril Lewis Laurent, appeared before a court of summary jurisdiction at Consett to answer a complaint of unlawfully and maliciously writing and publishing to the chairman of the justices for the Lanchester, Consett and Stanley division of the county an abusive and defamatory libel concerning him in his capacity as a justice of the peace. The applicant was ordered to enter into a recognizance in the sum of 100*l.* conditioned that he should keep the peace and be of good behaviour for two years from March 9, 1942. On August 9, 1943, the applicant again appeared before the justices to answer a complaint that he had been guilty of misconduct in respect of an offence against

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a police sergeant by using abusive language and was ordered to enter into a further recognizance of 10*l*. On October 18, 1943, he was summoned to show cause why the recognizance of 100*l*. entered into on March 23, 1942, should not be forfeited, and on November 15, 1943, the court adjudged that it should be forfeited, the breach of the condition alleged being the offence against the police sergeant. On January 4, 1944, the applicant appealed to quarter sessions for the county of Durham, and it was contended on his behalf that the adjudication of the justices on November 15, 1943, was a "conviction" within the meaning of s. 9, sub-s. 2, of the Summary Jurisdiction Act, 1879, as amended by s. 26, sub-s. 1, of the Criminal Justice Act, 1925 (1), and, therefore, the applicant had a right of appeal to quarter sessions under s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914. Quarter sessions held that the order of forfeiture was not a conviction of an offence within the meaning of the statutes and that it had no jurisdiction to hear the appeal. It also refused to state a case for the opinion of the High Court because it had not heard the appeal on its merits. The applicant now applied for an order of mandamus to the justices to hear and determine his appeal "against his "conviction on November 15, 1943, whereby it was adjudged "that the recognizance entered into by him on March 23, "1942, should be forfeited."

(1) By Summary Jurisdiction Act, 1879, s. 9, sub-s. 2 (as amended by s. 26, sub-s. 1, of the Criminal Justice Act, 1925): "Where "a recognizance conditioned to "keep the peace or to be of good "behaviour . . . . has been "entered into by any person ". . . . before a court of summary "jurisdiction, that court or any "other court of summary juris-"diction acting for the same "county, borough, or place, upon "proof of the conviction of the "person bound as principal by "such recognizance of any offence "which is in law a breach of the "condition of the same, or in the "case of a recognizance con-"ditioned to be of good behaviour, "upon proof that the person "bound as principal has since the "date of the recognizance been "guilty of conduct which is a "breach of the condition, may by "conviction adjudge such recog-"nizance to be forfeited, and "adjudge the persons bound "thereby, whether as principal or "sureties, or any of such persons, "to pay the sums for which they "are respectively bound."

Criminal Justice Act, 1914, s. 37, sub-s. 1: "Any person "aggrieved by any conviction of "a court of summary jurisdiction "in respect of any offence, who did "not plead guilty or admit the "truth of the information, may "appeal from the conviction in "manner provided by the Sum-"mary Jurisdiction Acts to a "court of quarter sessions."

Hauser (*Astell Burt* with him) for the applicant. The act of which the applicant was convicted in August, 1943, being a breach of his recognizance, was an offence within the meaning of s. 37, sub-s. 1, of the Act of 1914. There cannot be a conviction without an offence, and the word "conviction" being used in s. 9 of the Act of 1879, it follows that that of which the applicant was convicted must have been an "offence" within s. 37, sub-s. 1 of the Act of 1914. If the words "any conviction . . . . of any offence" in s. 37, are to be read as having a narrower meaning than "conviction," standing by itself the effect will be greatly to cut down the right of appeal given in cases where there has not been imposed imprisonment without the option of a fine: see s. 19 of the Summary Jurisdiction Act, 1879.

H. G. Garland for the respondent. Although in s. 9, sub-s. 2, of the Act of 1879, the words are "by conviction "adjudge such recognizance to be forfeited," the Act of 1914 speaks of "conviction in respect of an offence." "Conviction" in s. 9, sub-s. 2, is merely the equivalent of a formal order for the purposes of record, but "conviction" in s. 37, sub-s. 1, is intended to cover a conviction in respect of any offence that can be made the subject of a criminal charge. The applicant here was convicted in August, 1943, of misconduct towards a police sergeant. That was the offence. The fact that it constituted also a breach of recognizance did not make the breach a separate offence. There may be said to have been a conviction for the purposes of record, but it was not a conviction of an offence within the meaning of s. 37, sub-s. 1, of the Act of 1914. There is, therefore, no right of appeal.

VISCOUNT CALDECOTE C.J. [having stated the facts]: The applicant's right of appeal depends on statute. By s. 19 of the Summary Jurisdiction Act, 1879, a right of appeal was given to any person who was adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine. That was a limited right. By s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, that right of appeal was enlarged by providing as follows: "Any person "aggrieved by any conviction of a court of summary juris-"diction in respect of any offence, who did not plead guilty "or admit the truth of the information, may appeal from the "conviction in manner provided by the Summary Jurisdiction "Acts to a court of quarter sessions." The argument on behalf of the applicant is that in this case there was a "conviction in respect of an offence." That question must be considered in two parts—first, whether there was a conviction, and, secondly, if so, whether it was a conviction "in respect "of any offence." The first question depends on s. 9, sub-s. 2, of the Act of 1879. The word "conviction" appears in that sub-section twice. Where it is first used it refers to a conviction which has taken place either in the same court or in another court. It speaks of "proof of the conviction of the "person bound as principal by such recognizance of any offence "which is in law a breach of the condition of the same." Then the sub-section goes on to say: "may by conviction adjudge "such recognizance to be forfeited, and adjudge the persons "bound thereby, whether as principal or sureties, or any of "such persons to pay the sums for which they are respectively "bound."

Counsel for the applicant maintains that there was a conviction in the present case to satisfy s. 37, sub-s. 1, of the Act of 1914, because the section gives power to the court "by conviction" to adjudge such recognizance to be forfeited. Ordinarily speaking, one would not describe the order which is made for the forfeiture of a recognizance as a conviction, but in this section, I think, the word covers anything which is in the nature of a formal order. The words "may by conviction "adjudge such recognizance to be forfeited" are not very apt, but in my view they are enough to show that the first requirement of s. 37, sub-s. 1, of the Act of 1914 is satisfied.

I must now call attention to the words which have been inserted in s. 9, sub-s. 2, of the Act of 1879, by s. 26, sub-s. 1, of the Criminal Justice Act, 1925: "or in the case of a "recognizance conditioned to be of good behaviour, upon proof "that the person bound as principal has since the date of the "recognizance been guilty of conduct which is a breach of the "condition." They seem to have been intended to cover cases in which there has been no conviction of the person bound as principal by that recognizance.

Was the forfeiture of recognizance in this case a conviction "in respect of any offence"? I feel bound to say that the question has caused me some doubt. The word "offence" is said to be satisfied by showing that there has been a conviction of conduct which, although not capable of being made the subject of a criminal charge, was an offence, and that it is sufficient for the applicant to show that he has been convicted in respect of conduct which was a breach of his recognizance to be of good behaviour. That argument has some attractions. It is not easy to see why in the case of a conviction of a criminal offence a person should have a right of appeal, notwithstanding the fact that his fine may be only a few pounds, but that he should not have a right of appeal where he has been fined, as in this case, 100*l.*, as the result of the breach of his recognizance to be of good behaviour. I have been troubled to see on which side of the line the case should be decided, and I have come to the conclusion, with some doubt, that the word "offence" in s. 37, sub-s. 1, of the Criminal Justice Administration Act, 1914, means what at first sight it would seem to mean, namely, a conviction in respect of an offence which could be made the subject of a criminal charge. I, therefore, think the court of quarter sessions were right in saying that they were not empowered to hear an appeal against the adjudication of the justices. The application should be dismissed.

HUMPHREYS J. I agree. The matter is not by any means clear, and at times, in the course of the argument, I have felt that a person who has been ordered to forfeit a recognizance, which, in effect and for some purposes, in law is the same as a fine of the amount of the recognizance, ought to have a right of appeal to quarter sessions. It is, however, sound and established law that there is no appeal to quarter sessions which is not given in plain terms by statute. There is no such thing as a common law right of appeal.

It is, therefore, useful to look at the history of appeals to quarter sessions from a court of summary jurisdiction, at least since 1879, when, by s. 19 of the Summary Jurisdiction Act of that year, a right of appeal to quarter sessions was given to any person who had been ordered or adjudged by a conviction or order to be imprisoned without the option of a fine. Those words are so wide that they may be said to cover any order of any sort or description which could be made by a court of summary jurisdiction so long as it exercises the power to send a person to prison without the option of a fine. Clearly, at that date there was no appeal from the order which has been made by the justices in this case. If, therefore, this applicant is to have an appeal to quarter sessions he must show some subsequent Act which gives him that right in plain terms. He relies on s. 37, sub-s. 1, of the Criminal Justice Administration Act of 1914, by which Parliament gives a right of appeal from

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any conviction in respect of an offence although that conviction was not followed by any order of imprisonment. It is to be observed that Parliament in giving that, in some ways increased, right of appeal, does not follow the language of s. 19 of the earlier Act. There is no longer any right of appeal, as there was in 1879, from any order of a court of summary jurisdiction for failing to do or to abstain from doing any act required to be done or left undone. The right of appeal is expressly limited to the case of a person who has been convicted by a court of summary jurisdiction " in respect " of any offence." So I ask myself: Has the applicant been convicted by a court of summary jurisdiction of any offence? I cannot think it is right to say, where a person has voluntarily submitted to the giving of a formal undertaking to a court of justice and has subsequently broken that undertaking, that that is an offence against the law as distinct from something which gives jurisdiction to the court to order that he pay that amount of money. In my view, it would be wrong to say that the applicant has been convicted of an offence. The words " by " conviction " in s. 9 of the Act of 1879, which have troubled my Lord, have troubled me too, and I am not sure that I have now any clear idea why they were inserted. I would suggest that the explanation may be this. Section 9 deals with two separate matters. In the first place, what is envisaged under sub-s. 1 is a court of summary jurisdiction before which a man enters into a recognizance to do something, or to refrain from doing something, and then the court is informed that he has broken a term of that recognizance. On that, the powers of the court are to be found in sub-s. 1, of s. 9: " Where a " recognizance is conditioned for the appearance of a person " before a court of summary jurisdiction, or for his doing some " other matter or thing to be done in, to, or before a court of " summary jurisdiction, or in a proceeding in a court of " summary jurisdiction, such court, if the said recognizance " appears to the court to be forfeited, may declare the recog-" nizance to be forfeited, and enforce payment of the sum due " under such recognizance." The word " conviction " does not appear. The procedure seems to be quite different from that followed in the case of a person convicted of some offence. Sub-section 2 deals with rather a different matter. Where a person has entered into a recognizance on condition to keep the peace or to be of good behaviour or not to do or commit some act or thing and where it is proved to that court or any

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other court of summary jurisdiction that he has been since convicted of some offence which of itself is proof of the breach of the recognizance, or (in the words which were inserted by the Act of 1925) where there is proof that the person bound as principal has been guilty of conduct which is a breach of the condition, then the court must do something more than declare that the recognizance is forfeited. It must make an order, which seems to me to be not inappropriately stated in the words "by conviction." That conviction, however, is not followed by any power of adjudging any penalty other than the penalty adjudged by the original court before whom the recognizance was entered into. For that reason I agree with my Lord that the words "by conviction" in s. 9, sub-s. 1, of the Act of 1879, must be read as being equivalent to a formal judgment of some sort, a formal order made by the court in the nature of a conviction so that the matter will be on record in the case envisaged in the sub-section, namely, where the second appearance of the defendant is before a different court. That may or may not be the explanation of these curious words, "by conviction."

Birkett J.: I am of the same opinion. I associate myself with the observations which have fallen from the other members of the court as to the difficulties which arise in the consideration of this appeal.

Motion dismissed.

Solicitors for applicant: *Doyle, Devonshire & Co., for Molineux, McKeag & Cooper, Newcastle-on-Tyne.*

Solicitors for respondents: *Wrinch & Fisher, for Lazenby & Snowball, Consett.*

A. W. G.

LOOKER *v.* REGEM.

1944

Oct. 9.

Viscount Caldecote C.J.

Emergency legislation—Requisition—Land—Lease—Compensation—Storage of furniture—Disclaimer of lease by tenant—Liability of requisitioning authority for continuing storage charges—Compensation (Defence) Act, 1939 (2 & 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*d*).

The suppliant, under a lease for a term of years, was the tenant of land which was requisitioned by the military authorities who, by an agreement in writing, agreed to pay him certain separate sums as compensation in respect of rent and for expense incurred in storing furniture which he had been directed to remove. Subse-

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quently, the suppliant disclaimed the lease and ceased to be entitled to compensation for rent. On his petition claiming storage expenses incurred by him after the date of disclaimer :—

Held, that when the disclaimer became effective he ceased to be the tenant of the premises and disentitled himself by his own act to compensation for continuing storage expenses, because they were no longer incurred in complying with the directions given by the requisitioning authority.

Petition of right tried by Viscount Caldecote C.J.

The suppliant, Herbert William Looker, was a tenant of premises known as Woodgate, Dane Hill, Sussex, under a lease for a term of fourteen years. He occupied those premises until August 27, 1940, when the Secretary for War took possession of them pursuant to powers conferred on him by the Defence (General) Regulations, 1939, and the suppliant was directed to remove his personal effects. The suppliant entered into a contract with a firm to store his furniture for a payment of 8*l.* per month, and at all relevant times since September 24, 1940, it had been stored under that agreement. On April 10, 1941, an agreement was made between the suppliant and the War Department for compensation in respect of rent and storage expenses as follows :—" Whereas the department has " taken possession of Woodgate, Dane Hill, pursuant to the " powers conferred on it by the Defence (General) Regulations, " 1939, by reason of which compensation is or will be payable " to the said Herbert William Looker under the provisions " of the Compensation (Defence) Act, 1939, it is hereby agreed " between the parties hereto that the department shall pay " and the said Herbert William Looker shall accept payment at " the rate of 304*l.* per annum payable quarterly . . . . In " addition the department will pay at the rate of 96*l.* per annum " in respect of storage of furniture under s. 2, sub-s. 1 (*d*), of " the said Act."(1) In 1942 the suppliant elected to disclaim

(1) Compensation (Defence) Act, 1939, s. 2, sub-s. 1 : " The " compensation payable under this " Act in respect of the taking " possession of any land shall be " the aggregate of the following " sums, that is to say—(*a*) a sum " equal to the rent which might " reasonably be expected to be " payable by a tenant in occupation of the land, during the " period for which possession of " the land is retained in the exercise of emergency powers, under " a lease granted immediately before the beginning of that " period . . . . (*d*) a sum equal " to the amount of any expenses " reasonably incurred . . . . for " the purpose of compliance with " any directions given on behalf " of His Majesty in connexion " with the taking possession of " the land."

the lease under the right given to tenants of requisitioned land by the Landlord and Tenant (Requisitioned Land) Act, 1942. The lease was deemed to have been surrendered as from March 26, 1942, and after that date the War Department refused to pay any sum for storage of the furniture. By this petition the suppliant claimed in respect of storage expenses incurred from that date at the rate of 96*l.* per annum.

Comyns Carr K.C. and *Squibb* for the suppliant. There is no ground for implying in the agreement to pay storage expenses the term that, when the tenant ceased to be the tenant, both the payment for rent and that for storage should cease. The whole question of implied terms was reviewed in *Luxor (Eastbourne), Ld.* v. *Cooper* (1), where Lord Wright said (2) " There " have been several general statements by high authorities on " the power of the court to imply particular terms in contracts. " It is agreed on all sides that the presumption is against the " adding to contracts of terms which the parties have not " expressed. The general presumption is that the parties " have expressed every material term which they intended " should govern their agreement, whether oral or in writing. " But it is well recognized that there may be cases where " obviously some term must be implied if the intention of the " parties is not to be defeated, some term of which it can be " predicated that 'it goes without saying,' some term not " expressed but necessary to give to the transaction such " business efficacy as the parties must have intended." The liability of the War Department to pay for storing the furniture continued at least until either the tenant could find a suitable unfurnished house or the authorities handed back possession of the requisitioned house. The date of determination of the lease cannot be implied unless it could be said that the agreement contained nothing to indicate the period of its termination.

Sir Donald Somervell A-G. and *Valentine Holmes* for the Crown. The suppliant admits that the agreement contains no date at which it is to come to an end. Therefore, it must be taken to come to an end when the tenant ceases to be the person entitled to possession of the premises. The term to be implied here is that when the tenant became no longer entitled to possession his rights under the agreement would lapse both

(1) [1941] A. C. 108. (2) Ibid. p. 137.

in respect of rent and for the expenses incurred for storage of the furniture. The disclaimer was the act of the tenant himself and that act had the effect of depriving him of the expenses consequential to the requisitioning.

VISCOUNT CALDECOTE C.J. It is conceded by the suppliant that his disclaimer puts him in the position of not being able any longer to receive payment at the rate of 304*l.* per annum, but he contends that it does not disentitle him to receive payment at the rate of 96*l.* per annum in respect of the storage of furniture. Mr. Comyns Carr, on behalf of the suppliant, has suggested that the Crown could only avoid the payment in respect of the storage of the furniture by reading into the agreement of April 10, 1941, an implied clause—one that was so obvious that it was not thought necessary to put it into writing because it would, to use Lord Wright's expression in *Luxor (Eastbourne), Ld.* v. *Cooper* " go without saying " (1)—and no such clause can be so read in. The Attorney-General, on the other hand, contends that the suppliant can only succeed by inserting into the agreement some implied term, which the Attorney-General formulated at my request. I do not think that the agreement in question needs the implication of any new term to give proper effect to it. As Lord Wright said in *Luxor (Eastbourne), Ld.* v. *Cooper* (1), in the passage to which I have been referred, it is not for the courts to re-write agreements. Agreements are to be construed. In so far as it is necessary to imply a clause or a term so as to give effect to an agreement between the parties, the court will imply the proper term, but in the case now before me I think that the agreement is reasonably plain and can be properly construed without implying or adding any new clause.

The compensation to which the suppliant is entitled can, in my view, be simply ascertained. It is the aggregate of certain sums which is payable under s. 2, sub-s. 1 (*a*), namely, a sum equal to the rent, and a sum payable under s. 2, sub-s. 1 (*d*), namely, a sum equal to the amount of the expenses reasonably incurred in complying with any directions given on behalf of His Majesty in connexion with the taking possession of land.

It is conceded by Mr. Comyns Carr that when the suppliant disclaimed the lease and so ceased to have any right to possession of the house in question he ceased to be entitled to receive

(1) [1941] A. C. 108, 137.

payment of the sum of 304*l*. a year in respect of the rent under para. (*a*) of s. 2, sub-s. 1. In my view, when the disclaimer became effective, he ceased to have any right, not only as to part of the compensation, but to the whole. It was the suppliant's own act which disentitled him to receive compensation. Whether he received it under one part of the Act or whether he received it under another part seems to me to make no difference to the time during which the agreement subsisted. If the suppliant, having disclaimed the lease, became disentitled to receive any further compensation, it could not be said that under s. 2, sub-s. 1 (*d*), there were any directions given on behalf of His Majesty in connexion with the taking possession of the land in complying with which the suppliant had to incur expense. He had ceased to be the tenant, and he no longer incurred any expense to comply with the directions given in connexion with the taking possession of the land. I think that the answer made by the Crown to this petition is right, and that judgment should be given accordingly.

Judgment for respondent.

Solicitor for the suppliant: *Gibson & Weldon.*
Solicitor for the respondent: *Treasury Solicitor.*

[Reported by H. GREENFIELD, Esq., Barrister-at-Law.]

MARSH *v.* COMMISSIONER OF POLICE AND ANOTHER.

C. A.
1944
Oct. 12.
Lord Goddard, Scott and du Parcq L.JJ.

Innkeeper—Lien—Claim to ring deposited by guest as security for bill.

A guest at an inn, when asked to pay his bill, said he was unable to do so, but he handed to the innkeeper a ring, which he had stolen, as security for the payment of his bill:—

Held, that the innkeeper's lien attached to the ring.

Decision of Divisional Court [1944] K. B. 99. reversed.

APPEAL from Divisional Court.

On November 24, 1942, one George Eric Nall was received as a guest at the Ritz Hotel, London, which was an inn within the Innkeepers Act, 1878. On November 25, 1942, Nall obtained by fraud from the Goldsmiths & Silversmiths Co., Ld., a woman's diamond and sapphire ring. On November 28, 1942, Nall was asked by the hotel to pay his bill. He stated he was unable to do so, but he handed the ring to the manager of the hotel as security for the payment of the bill, and he remained in the hotel until November 29. No suggestion was made that the hotel knew of the circumstances in which the ring had come into Nall's possession. On January 12, 1943, he was convicted of larceny of the ring. At a court of summary jurisdiction sitting at Feltham, Middlesex, Charles Owen Marsh, on behalf of the Goldsmiths & Silversmiths Co., Ld., applied under s. 1 of the Police (Property) Act, 1897, that the Commissioner of Police, in whose hands the ring was as having been an exhibit in criminal proceedings, should be directed to deliver the ring to him. Alfred Francis McGee, on behalf of the Ritz Hotel (London), Ld., also applied under s. 1 that the Commissioner should be directed to deliver the ring to him. The two applications were heard together, and the justices held that the hotel company, as innkeepers, had a lien on the ring and were entitled to an order in their favour. Marsh appealed and the Divisional Court held that an innkeeper's lien had not attached to the ring as the hotel company had merely received it as a pledge. McGee appealed to the Court of Appeal.

Paull K.C. and *Horace Fenton* for McGee. An innkeeper's lien extends to all the property of a guest which he brings into the inn so that it attaches even if the goods have been stolen by the guest: *Mulliner* v. *Florence* (1). The rights of innkeepers with respect to goods brought to inns by guests are founded, not on bailment, pledge, or contract, but on the custom of the realm: per Lord Esher M.R., *Robins & Co.* v. *Gray* (2). It is only necessary for the innkeeper to show that the goods came into the inn as the goods of the guest. It is immaterial that the guest had handed the ring over to the innkeeper, and that it was not taken as part of his luggage. [*Gordon* v. *Silber* (3) was also cited.]

Sandlands K.C. and *Beecroft* for Marsh. The mere fact that goods are brought to an inn does not of itself give a lien to the innkeeper. Everything in the exclusive possession of the guest is outside the scope of the lien. There is, for instance, no lien in respect of goods on the person of the guest. The innkeeper must receive the goods in his character of innkeeper, and as the luggage of the guest : *Smith* v. *Dearlove* (1). This ring was handed over by the guest as security for the money he owed. It was taken as a pledge only and the pledgee could not obtain a good title to stolen goods as against the true owner. There was the further question of the jurisdiction of the magistrates to order delivery of the goods to the hotel. The question of jurisdiction had not been raised before the magistrates or the Divisional Court, but it could be taken at any time : *Knight* v. *Halliwell* (2). Under the Police (Property) Act, 1897, s. 1, the magistrates could order delivery of the goods to the "owner." The hotel was not the owner of the ring but merely had a lien on it. Under the Sale of Goods Act, 1893, s. 24, where goods are stolen, the property reverts in the owner : *Buller & Co., Ld.* v. *T. J. Brooks, Ld.* (3). The magistrates were wrong in law in ordering the ring to be handed to the hotel, when they learned that the hotel only had a lien, no order should have been made.

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(1) (1878) 3 Q. B. D. 484.
(2) [1895] 2 Q. B. 501.
(3) (1890) 25 Q. B. D. 491.

Paull K.C., in reply on the question of the magistrates' jurisdiction. The question of jurisdiction had not been raised in connexion with the application of McGee on behalf of the hotel. This is an appeal from the refusal of the magistrates to make an order in favour of Marsh on his application. The question does not arise on this application, the only application before the Court of Appeal.

LORD GODDARD stated the facts and continued : The point is taken on behalf of the Goldsmiths & Silversmiths Co., that this ring was not the subject of an innkeeper's lien. It has not been contested—and the authorities seem to be perfectly clear and uniform on the point—that an innkeeper's lien will attach to property brought by a guest to the hotel although the property has been stolen. I need not refer to all the cases which have been cited, but *Gordon* v. *Silber* (4), is a clear authority on that point, and the law was also stated thus in *Robins & Co.* v. *Gray* (5). Mr. Sandlands, however, argues that a lien does not attach in this case because the ring was always in the exclusive possession of the guest and the cases show that in such circumstances the lien does not attach.

The authorities show, no doubt, that an innkeeper is not entitled to detain the person of a guest who has not paid his bill, and, as a corollary of that, he is not entitled to take the clothes off the back of a guest, as was attempted to be done in one case. I can find nothing which shows that, where a guest comes with an article of jewellery to a hotel, and has it in his possession at the hotel, the innkeeper's lien does not attach to that property. It seems to me that, if a person takes jewellery to the hotel, or acquires it during his residence there and takes it to the hotel, there is no more reason why the lien of an innkeeper should not attach to that property than to the clothes which the guest takes with him. It is not a question whether it is " baggage " or " luggage " in the sense in which those words are generally used. The lien attaches to the property or the chattels which the guest brings to the hotel in his character as a guest. If a man is staying in a hotel in London and he does some shopping, buys things and takes them to the hotel and keeps them there, I see no reason why the authorities should constrain me to hold that the innkeeper has not the same lien as he would have in respect of actual property, such as clothes and so forth, which the guest has in his bags when he arrives.

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(1) (1848) 17 L. J. (C. P.) 219.
(2) (1874) L. R. 9 Q. B. 412.
(3) (1930) 46 T. L. R. 233.
(4) 25 Q. B. D. 491.
(5) [1895] 2 Q. B. 501.

Mr. Sandlands also contends that the lien did not attach here because, when the guest was challenged with not having paid his bill, he gave the ring as security. That seems to me merely to show that the guest was accepting the inevitable. He knew he would not be allowed to leave the hotel with his property unless he paid his bill. It cannot make any difference in law whether the innkeeper seeks to exercise his lien when the bags are in the hands of the porter who is carrying them downstairs, or whether he seeks to exercise his lien when the bags are in the hands of the guest who is carrying them downstairs.

I want to say one thing about the view which was taken by the Divisional Court. Lord Caldecote C.J. said (1): " On " the facts of the present case it is, I think, clear that the " hotel proprietors did not exercise an innkeeper's lien on " this ring for the simple reason that they were never in " a position to do so until the time came when the guest, " owing a bill which he was unable to pay, produced and " handed the ring to the innkeeper as security for the payment " of the debt." The Lord Chief Justice, apparently, considered the handing over of the ring as an entirely separate and independent transaction amounting to a pledge. With all respect I am unable to agree. The lien attaches to property, contained in luggage, although the innkeeper does not know what goods are contained in the luggage, and it attaches although the occasion for exercising it does not arise until the guest has incurred a debt, and has been presented with a bill, and seeks to leave the hotel without paying the bill. It seems clear in this case, that the justices could find that this ring was brought into the hotel by the guest in his capacity and character as a guest, and, therefore, whether the innkeepers knew it was there or not, does not matter. The lien attached to it and, as soon as the innkeepers knew of the existence of the ring, they could exercise their lien on it. It makes no difference in law whether the guest produced the ring and said: "There you are. " I owe you a debt and you can exercise your lien on this"; or whether the innkeeper laid his hand on it and said: "I am " going to exercise my lien on this."

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(1) [1944] K. B. 101.

One may illustrate the position which arises in this way. Supposing a person staying in a hotel finds that he has had his pocket picked and is temporarily bereft of money. He goes to the innkeeper and says: "Will you lend me 5*l*. and " I will give you this piece of property, my watch"—or whatever it is—" as security." There is then, no doubt, a pledging of the watch, which arises from the fact that the innkeeper has lent money on it. If it be that the guest repays the 5*l*., but cannot pay the amount of his bill, it seems to me clear that the innkeeper can say: "I have an innkeeper's " lien on your watch, and not only a lien for the 5*l*. which " I lent you as a matter of pledge. You brought the watch " to the hotel. It is now in my possession, and I shall keep " it as security for your bill." In this case it becomes a fortiori when one sees that this guest was allowed to stay in the hotel for a day after the property had actually been in the hands of the innkeeper.

For these reasons I cannot agree with the decision of the Divisional Court, and the appeal must be allowed.

Mr. Sandlands took another point. He argued that under the Police (Property) Act, 1897, the justices had no power to order the ring to be given up to Mr. McGee because that statute, s. 1, sub-s. 1, only confers on a court of summary jurisdiction a right to make an order for the delivery of the property to the person who appears to the court to be the owner thereof, or, if the owner cannot be ascertained, to make such order with respect to the property as to the court may deem fit. Mr. Sandlands says that here the Goldsmiths & Silversmiths Co., were the owners of the ring, and, therefore, even if the justices came to the conclusion that the hotel had a lien, the section does not entitle them to hand the ring to the hotel, because the hotel company were not the owners thereof. I do not think it is necessary to give a concluded opinion on the meaning of the word " owner " in that subsection. The only matter with which we are dealing is the claim of Mr. Marsh to have the ring handed to him, and against that decision he appealed by way of special case to the Divisional Court. It is on that proceeding that we are now hearing this appeal, because the Divisional Court held that Mr. Marsh was entitled to the ring. In my opinion, the decision of the justices was right, that Mr. Marsh was not entitled to have the ring, and, therefore, it is not necessary for us to go on to decide whether the justices were justified in ordering the ring to be given up to Mr. McGee. We hold that Mr. Marsh has no right to the ring and, therefore, the appeal will be allowed with costs.

Scott L.J. : I agree.

du Parcq L.J. : I agree. Lord Caldecote C.J., said (1) : " I base my judgment on the view which I take that the " ring had never been received as part of the guest's luggage." On the facts I agree with my lord that it was open to the justices to find that the ring was received as part of the guest's luggage. Nobody doubts—as certainly it was not doubted by the learned judges in the Divisional Court—that a ring may be part of a guest's luggage. A woman's ring may be part of a male guest's luggage. This ring came into the possession of Nall, the guest, on November 25, the day after he was received as a guest at the hotel. On November 28 it was still in his possession. The justices have stated that no suggestion was made before them that possession of the ring by the hotel had not been continuous, by which statement I understand them to mean that the ring had been continuously in the hotel as part of the guest's goods from the moment he first brought it there. On November 28, Nall allowed the hotel to take it into their custody. The position is exactly the same as if it had been a fur coat or some other

(1) [1944] K. B. 99, 102.

article of clothing which he had in his room and which he had transferred to their custody so that they might be sure it should not be removed.

I thought at one time that it might turn out that there had been some conversation proved before the justices which made it clear that, far from being the exercise of a lien, the action of the hotel was that of persons taking a ring under an entirely separate contract. There is nothing to support such a suggestion. It now appears that there was no evidence before the justices of what precisely had happened, but I am clear that we cannot say that they were wrong in drawing the inference which they did. It is impossible to say that the view which Lord Caldecote C.J. took was the only view which could be taken on the evidence.

As to the other aspect of the case, I entirely agree with what my lord has said, that it would be wrong for us to give any decision on the subsidiary point which has been raised as to jurisdiction. The position now is that the ring has been handed over to the Goldsmiths and Silversmiths Co. They have given an undertaking to pay a sum of money making up the total of the hotel bill in the event of the appeal to this court proving successful. The appeal has now proved successful, in the sense which the parties clearly contemplated because they were speaking with reference to the contentions which had been raised before the justices. The result is that, whatever we were to decide on this question of jurisdiction, the position of the parties would not be affected in the slightest degree. It would be a purely academic point, and in such circumstances I do not think that we ought to be asked to hear and determine it. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for McGee : *Leslie J. Griffin.*
Solicitors for Marsh : *McKenna & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

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C. A.

1944

Oct. 20, 23.

MacKinnon and Lawrence L.JJ., Cassels J.

NICHOLLS *v.* F. AUSTIN (LEYTON), LIMITED.

Factory Acts—Dangerous machinery—Fencing—Circular saw—Modification of Act by regulations—Binding effect of previous decision—Factories Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1 ; *s.* 60, *sub-ss.* 1, 2 (*c*) ; *s.* 159, *sub-s.* 1*—Woodworking Machinery Regulations,* 1922 (*St. R. & O.*, 1922, *No.* 1196), *reg.* 10.

Section 14, sub-s. 1, of the Factories Act, 1937, enacts that " Every dangerous part of any machinery . . . . shall be securely " fenced." Section 60, sub-s. 1, gives the Secretary of State power to make special regulations which by sub-s. 2, may modify any provisions of part II of the Act, which includes s. 14. Regulation 10 of the Woodworking Machinery Regulation, 1922, which, by s. 159 of the Act, were to be deemed to have been made under that Act, prescribed a certain form of fencing for circular saws.

The plaintiff, while operating a circular saw belonging to her employers, the defendants, was injured through a piece of wood flying out of the machine which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations, 1922 :—

Held, that reg. 10 of the regulations of 1922 modified s. 14 of the Act of 1937, and, accordingly, that the defendants had not committed a breach of a statutory obligation and were not liable to the plaintiff.

Miller v. *William Boothman & Sons, Ld.* [1944] K. B. 337 followed.

Appeal from Stable J.

The defendants, F. Austin (Leyton), Ld., were the occupiers of a factory at Leyton, in which was a Straight Line Edgar Machine Circular Saw for cutting wood worked by mechanical power. The plaintiff, Mrs. M. J. S. Nicholls, was employed by the defendants as a factory hand, and, on May 29, 1943, was working on the machine when a piece of wood, which had been split off the plank which was being sawn, flew out of the machine and struck her left hand, injuring it. The plaintiff alleged that the defendants were guilty of negligence and a breach of their statutory duty under s. 14 of the Factories Act, 1937, and reg. 10 of the Woodworking Regulations, 1922, in that they had failed to fence the machine securely and in accordance with reg. 10. In the alternative, she claimed damages at common law alleging negligence against the defendants in not providing a safe system of working for their employees. Stable J. held that the obligation to fence imposed by s. 14 of the Act of 1937 was an obligation to protect workers, not only against direct injury by contact with the cutting edge of the machine, but also against indirect injury from something flying from the machine; that the decision of the Court of Appeal in *Miller* v. *William Boothman & Sons, Ld.* (1) applied to the case of a guard against contact with the cutting edge of the machine and not to indirect danger; and that the decision did not mean that reg. 10 was in substitution of s. 14, but merely a modification of it. He, accordingly, held that the statutory duty to fence the machine had not been complied with and awarded the plaintiff 350*l.* damages. The defendants appealed.

Beney K.C. and *Marven Everett* for the defendants. The court is bound by the decision of the Court of Appeal in *Miller* v. *William Boothman & Sons, Ld.* (1) that reg. 10, modified s. 14, sub-s. 1, of the Act of 1937, and that therefore the defendants, who had provided a circular saw, the fencing of which did not comply with the sub-section but did comply with the regulation, were not in breach of their statutory obligation and not liable to the plaintiff who had been injured while operating the saw. The Court of Appeal overruled the decision of Wrottesley J. in *Whitten* v. *Army and Navy Stores* (2) that reg. 10 of the regulations did not affect the absolute obligation imposed by s. 14 of the Act. In the present case the defendants are under no liability at common law because the machine they provided complied with the requirements of the regulation. In any event, the obligation imposed by s. 14, sub-s. 1, securely to fence every dangerous part of any machine has reference to contact with a dangerous part of a machine and does not impose an obligation to see that the machine shall not eject part of the material which is being worked.

Edgedale for the plaintiff. This court is not bound by the decision in *Miller* v. *William Boothman & Sons, Ld.* (1), as it was given per incuriam. It was held by the full Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ld.* (3), that the Court of Appeal was bound to follow previous decisions of its own with certain exceptions, one of which was where the previous decision was given per incuriam. The Court of Appeal in *Miller* v. *William Boothman & Sons, Ld.* (1) were under the impression that s. 60 of the 1937 Act was a re-enactment of s. 79 of the Factory and Workshop Act, 1901, but there was a very important difference between the two sections. Section 79 of the 1901 Act gave power to the Secretary of State to make regulations subject to the provisions of the Act, whereas s. 60 of the 1937 Act gave power to the Secretary of State to make regulations which might modify any provisions of part II of the Act which included s. 14. The regulations of 1922 were made under the Act of 1901, and could not modify the provisions of that Act without being ultra vires. Those regulations remained in force after the passing of the 1937 Act by virtue of s. 159. The regulations could not have a different meaning after the passing of the 1937 Act from that which they had before the passing of that Act. If it had been intended that the regulations should modify the provisions of s. 14, express words to that effect ought to have been included in the regulation. This point was not taken before the court in *Miller's* case (1), and they gave their decision under a misapprehension. Alternatively, the defendants were under a liability at common law to supply proper fencing to the machine. [He cited *Paine* v. *Colne Valley Electricity Supply Co.* (2) ; *Wilsons & Clyde Coal Co., Ld.* v. *English* (3) ; *Callaghan* v. *Fred Kidd & Son (Engineers), Ld.* (4)]. An employer is not excused from liability at common law to a workman who is thereby injured because he has complied with the requirements of the Woodworking Regulations as regards a different danger.

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(1) [1944] K. B. 337.

(2) [1943] K. B. 580.

(3) [1944] K. B. 718.

Beney K.C. replied.

Cur. adv. vult.

Oct. 23. MACKINNON L.J. So far as the plaintiff's claim with regard to breach of statutory duty goes, she alleges that there was a breach by the defendants of their statutory duty under s. 14 of the Act of 1937, which provides that : "Every dangerous "part of any machinery, other than prime movers and "transmission machinery, shall be securely fenced unless it "is in such a position or of such construction as to be as safe "to every person employed or working on the premises as "it would be if securely fenced." The only other material part of that section worth noticing is at the end : "The "Secretary of State may, as respects any machine or any "process in which a machine is used, make regulations

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(1) [1944] K. B. 337.
(2) (1938) 160 L. T. 124.
(3) [1938] A. C. 57.
(4) [1944] K. B. 560.

" requiring the fencing of materials or articles which are " dangerous while in motion in the machine." I mention that because the danger here arose, not from the movement of dangerous parts of the machine itself, but from the ejection by the machine of some of the wood which was put in the machine and was being operated on. In fact, no regulations under that final paragraph of the section have been made by the Secretary of State.

If that section stood alone, prima facie it would have been open to the plaintiff to say that this machine did not have every dangerous part of it securely fenced, but the strict provisions of s. 14 are modified in this way. By s. 60, sub-s. 1, it is provided : " Where the Secretary of State is satisfied " that any manufacture, machinery, plant, process, or " description of manual labour, used in factories is of such " a nature as to cause risk of bodily injury to persons employed " in connexion therewith, or any class of those persons, he " may, subject to the provisions of this Act, make such special " regulations as appear to him to be reasonably practicable " and to meet the necessity of the case," and then it is provided by sub-s. 2 that such special regulations may, among other things, " modify or extend with respect to any class or " description of factory any provisions of part I, part II or " this part of this Act, being provisions imposing requirements " as to health or safety," s. 14 being in part II of the Act. Under the Factory and Workshop Act, 1901, special regulations with regard to wood-working machinery, of which this machine was one, were issued in November, 1922. Although s. 60 of the Act of 1937 gives the Secretary of State power to make similar regulations under that Act, no doubt it was thought it would be unnecessary to reprint the regulations of 1922, and, therefore, it was provided by s. 159 of the Act of 1937 : " Subject as hereinafter provided the enactments referred to " in the fourth schedule to this Act "—which includes the Act of 1901—" are hereby repealed to the extent specified in " the third column of that schedule : Provided that any . . . . " regulation . . . . made . . . . under any enactment re- " pealed by this Act which is in force at the commencement of " this Act "—which includes s. 79 of the Factory and Workshop Act, 1901—" shall continue in force and shall have effect as " though it had been made or given under this Act." The meaning of that is that one must treat the Act of 1901 as providing by s. 60 of the Act of 1937 that the Secretary of State may make regulations which shall modify or extend the duty imposed by s. 14, and by virtue of s. 159 the regulations previously made under the Act of 1901 in November, 1922, are to be deemed to have been issued by the Secretary of State under s. 60. The special regulations so given force under s. 60 of the Act of 1937 provide a self-contained code as to the sort of fences which are to be provided for a circular saw, which is the machine with which we are concerned in this case. Regulation 10 provides : " Every circular saw shall be fenced " as follows," and then there is a long and detailed provision as to how that fencing is to be accomplished.

In the present case the fencing of this circular saw was not only sufficient to comply with every detail of reg. 10, but it was more efficient and more complete than was necessary to comply with the requirements of that regulation, so there does not seem to be any doubt that the defendants carried out their duty under the regulation having regard to the nature of this saw and the elaborate housing under which it performed its operations. The defendants, therefore, say that, if the plaintiff alleges a breach by them of their statutory duty under s. 14 her claim must fail, because their duty under s. 14 is only to comply with para. 10 of the regulations of 1922 which, under s. 60 of the Act, the Secretary of State has imposed by way of modification of what would otherwise be an absolute duty to fence a circular saw. The learned judge, accepting that as being the result, if the obligation under the regulations is regarded as being in substitution for the general obligation to fence under s. 14, nevertheless held that, although the defendants had complied with the regulations, and, to that extent, had complied with their obligations under s. 14, there still remained a collateral duty under s. 14 to provide fencing against the danger of material, which was being operated on by the circular saw, flying out and causing injury. There is a regulation of 1922, which deals with the danger of the operator's hands coming in contact with the circular saw. We are, however, dealing, not with that danger, but with the danger of the possible ejection of material. The judge, however, held that the duty to fence dangerous machinery still existed under s. 14 against the danger of material being ejected from the machine.

It is said by the defendants, and I think rightly said, that that finding is in conflict with the decision of this court in

Miller v. *William Boothman & Sons, Ld.* (1), in particular, inasmuch as a similar view to that adopted by the learned judge in this case had previously been adopted and acted on by Tucker J. in *Lewis* v. *Denyé* (2), and by Wrottesley J. in *Whitten* v. *Army and Navy Stores, Ld.* (3). Both those cases were expressly mentioned and considered by this court in *Miller* v. *William Boothman & Sons, Ld.* (1). The facts in that case are rather different from the facts here, but there are two or three passages in the judgment of the court delivered by Goddard L.J., which seems to me to be not only material but even conclusive on this point. He says (4): " In our " opinion, these regulations"—those are the regulations of 1922—" must be regarded as modifying the provisions of " s. 14 in respect of these machines and of substituting the " prescribed guarding and fencing for the absolutely secure " fencing which the section would otherwise require. It is " difficult, indeed, to see what other object these regulations " could have." A little lower down he says: " To any one " reading them it could not but appear that, provided he "—that is the employer—" followed the provisions of the " regulations and saw that his saws were constructed and " protected in accordance therewith, he was fulfilling his " duties under the Act." So far as the statutory duty under the Act is concerned, the defendants, it is admitted, complied with the whole of their duty under the regulations of 1922 and are entitled to say that they had carried out their statutory duty under s. 14 of the Act. After referring to passages in the two previous decisions I have mentioned, Goddard L.J. says: " We are of opinion that so much of " Tucker J.'s judgment in *Lewis* v. *Denyé* (2) as holds that " reg. 10 of the regulations does not affect the absolute " obligation otherwise imposed by s. 10 of the Act of 1901, " now s. 14 of the present Act, must be overruled and so must " the judgment of Wrottesley J. in *Whitten* v. *Army and* " *Navy Stores* (3) on this point." He added (4) that the decision of the court was " based entirely on the ground that " s. 60 permits of a modification of the absolute obligation " under s. 14, and that the Woodworking Machinery Regula-" tions, 1922, have modified it." It seems to me clear, so far as the statement of claim in this case alleges breaches of the statutory duty imposed by the Act of 1937, it being admitted that the defendants fully complied with the requirements of the regulations of 1922, any attempt to say that there was any surviving or additional duty put on them by s. 14 is erroneous and is not justified having regard to that decision of this court. I do not know that Stable J. refers to it, bu the learned judge does say he has read *Miller* v. *William Boothman & Sons, Ld.* (1), and I confess I do not understand on what ground he thought he was able to distinguish it from the present case in so far as he had to consider the statutory duty of the defendants under the Act. On that ground I think the decision of the learned judge was wrong, and that this appeal must succeed.

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(1) [1944] K. B. 337.
(2) [1938] 2 All E. R. 813.
(3) [1943] K. B. 580.
(4) [1944] K. B. 341.

There is one other matter I must mention. Mr. Edgedale, seeking to support the judgment of Stable J. (and he is entitled to rely on every possible ground), contended before us that, apart from any statutory duty under the Act of 1937, there was a breach by the defendants of their common law duty to take care to provide a safe system of working and the safety of the premises and surroundings of their workmen. We have been reminded that that sort of common law duty was discussed in *Wilsons & Clyde Coal Co.* v. *English*, where Lord Wright said (2): "The same principle, in my "opinion, applies to those fundamental obligations of a "contract of employment which lie outside the doctrine of "common employment, and for the performance of which "employers are absolutely responsible. When I use the word "'absolutely' I do not mean that employers warrant the "adequacy of plant, or the competence of fellow employees, "or the propriety of the system of work. The obligation is "fulfilled by the exercise of due care and skill. But it is not "fulfilled by entrusting its fulfilment to employees, even "though selected with due care and skill." Here the plaintiff is saying that if there had been a reasonable exercise of care and skill, the defendants would not have provided this machine without having taken precautions to guard against danger which, as reasonable people, they ought to have anticipated. There is no finding by the learned judge on this common law aspect of the matter, because he decided the case on the statute. On the facts, I do not think it would be right for this court to hold that there was any breach at common law by the defendants in exercising reasonable skill and care in foreseeing and providing against this form of accident.

(1) [1944] K. B. 337. (2) [1938] A. C. 57, 78.

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NICHOLLS v. F. AUSTIN (LEYTON), LD.

LAWRENCE L.J.: I am of the same opinion. On the question of common law negligence, it is to be observed that there was no evidence of any previous accident, no evidence of any previous complaint and no finding by the learned judge that there was common law negligence. In addition one must also have regard to the fact that the Secretary of State has made, in the regulations to which my Lord has alluded, most specific provisions as to the protection which should be given to this saw and has made no regulations under the last paragraph of s. 14 requiring the fencing of materials or articles which are dangerous while in motion in the machine. In those circumstances, I cannot think that any reasonable provider or user of such a machine as this can be held blameworthy for thinking that the machine was adequately fenced. For those reasons, I agree with the judgment proposed by my Lord.

CASSELS J: I agree.

Appeal allowed.

Solicitors for plaintiff: *Shaen, Roscoe & Co.*
Solicitors for defendants: *Barlow, Lyde & Gilbert.*

R. F. S.

GOLDMAN v. EADE.

1944

Oct. 26.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

Justices—Special Case—Statement—Application—Copy for each justice—Written application handed to justices in court—Summary Jurisdiction Rules, 1915 (*St. R. & O.*, 1915, *No.* 200), *r.* 52.

The requirement of r. 52 of the Summary Jurisdiction Rules, 1915, that, on an application to state a special case, there shall be left with the clerk of the court a copy of such application for each of the justices, which shall be duly forwarded by the clerk to each of the said justices, is not complied with by handing a written application to the clerk which is in turn handed by him to the justices in court, and in such circumstances the justices have no power to state a case.

PRELIMINARY objection to case stated by Suffolk justices.

On February 21, 1944, informations were preferred by the respondent, Henry Eade, a divisional enforcement officer of the Minister of Food, against the appellant, David Goldman, before a court of summary jurisdiction sitting at Stowmarket, charging him with offences in contravention of art. 2 (1.) of the Poultry (Control and Maximum Prices) Order, 1943. The justices convicted the appellant and sentenced him to a term of imprisonment and ordered him to pay a fine and a sum in respect of costs. At the conclusion of the hearing, the appellant, being dissatisfied with the determination of the justices in point of law, in purported pursuance of the provisions of the Summary Jurisdiction Acts, 1857 and 1879, and of r. 52 of the Summary Jurisdiction Rules, 1915, served on the clerk of the court in the presence of the justices an application to the justices to state and sign a special case. The application was in the following form: "I the undersigned request you to state a case in respect of my conviction "on the 21st day of February 1944. Signed D. Goldman. "To the clerk and justices, Petty Sessional Division, of Stow "Hundred." The notice was handed by the clerk to the justices in court, and the appellant entered into a recognizance as prescribed by the statutes in that behalf. Apart from this notice, the appellant served no application on any of the justices. The justices stated a case subject to the application mentioned being held to be a sufficient compliance with the statutory requirements in respect of an application to state a case.

Before the hearing of the appeal a preliminary objection was taken on behalf of the respondent that the application for a special case did not satisfy the requirements of s. 33 of the Summary Jurisdiction Act, 1879, and of r. 52 of the Summary Jurisdiction Rules, 1915, (1) and, consequently, that the court had no power to hear the appeal.

Valentine Holmes for the respondent. There was no power to state a special case here since the statutory requirements in relation thereto had not been complied with. Those requirements have been held to be mandatory in their character and strict compliance with them constitutes a condition precedent

(1) By Summary Jurisdiction Rules, 1915, r. 52: "An application to a court of summary "jurisdiction . . . . to state a "special case shall be made in "writing and shall be left with the "clerk of the court at any time "within seven clear days from the "date of the proceedings to be "questioned, and there shall also "be left with him a copy of such "application for each of the "justices constituting such court "which shall be duly forwarded by "him to each of the said "justices . . . ."

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to the power to state a case. In *Rex* v. *Stoke-on-Trent Justices* (1), which was concerned with another requirement of the rule, the court held that it was necessary, not only that the application for a case should be left with the clerk of the court within the prescribed period of seven days, but also that the copy of the application for each of the justices should be left with the clerk within the same period. It is true that Lord Hewart, C.J., said in that case: "It is not necessary "now to decide the further question whether the limitation "of time amounts to a condition precedent the fulfilment of "which is essential in order that the justices may state a case," but it appears that the attention of the court was not called to two earlier decisions under r. 18 of the Summary Jurisdiction Rules, 1886. That rule differed in its terms from r. 52, but the underlying principles of the decisions are applicable to the present case. In *South Staffordshire Waterworks Co.* v. *Stone* (2) it was held that justices had no power to state a case unless the application had been made to the court in writing and a copy left with the clerk of the court within seven days from the date of the proceeding to be questioned. That was followed in *Lockhart* v. *St. Albans Corporation* (3), where it was said that there was no right of appeal from justices by case stated unless the directions of the rules with regard to the mode of application for a case had been observed. In that case an application in writing for a case had been given to the clerk, but no notice had been given to the justices. The only possible distinction between that case and the present is that here the notice to the clerk was handed to the justices in court. That could make no difference in principle, since in neither case was a copy of the application "forwarded to each of the said "justices."

Alban Gordon for the appellant. The cases referred to all related to the question of the time within which the notice to the clerk and the justices must be served. That is not the point now before the court. The question here is whether the notice was, in fact, served on the justices. Although in a strict literal sense the requirements of r. 52 were not complied with, the court should look at the substance, and not at the form, of what was done. In *Lockhart* v. *St. Alban Corporation* (3 Lord Esher M.R. said: "The cases shew that "the application in writing must be made to the court, i.e.,

(1) [1926] 2 K. B. 461, 468.
(2) (1887) 19 Q. B. D. 168.
(3) (1888) 21 Q. B. D. 188.

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"to the justices who were parties to the proceeding." That requirement was sufficiently complied with here by the clerk handing the written application to the justices in court, since the object of the rule is to ensure that the justices who heard and determined the case should be furnished with the knowledge that a written application had been made within the prescribed time. There was, therefore, a substantial fulfilment of the requirements of the rule, and the justices were entitled to state a case.

The court upheld the preliminary objection.

VISCOUNT CALDECOTE C.J. In this case the argument put forward on behalf of the appellant is that, although he has not complied with the strict provisions of r. 52, something else was done which is sufficient to satisfy the substance of the intention of the rule. The cases which have been cited to us shew that the court has taken a more strict view of these matters than that. We think, therefore, that the objection taken by the respondent is good, and that we have no power to hear this special case.

HUMPHREYS J. I agree.

BIRKETT J. I agree.

Appeal dismissed.

Solicitor for respondent : *Treasury Solicitor.*
Solicitors for appellant : *A. Kramer & Co.*

P. B. D.

ARNELL v. HARRIS.

1944

Oct. 25.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

Justices—Order for return of property—"Property taken from person "charged before a court of summary jurisdiction"—No accusation or charge made at time property taken—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict., c.* 49), *s.* 44.

The respondent, a post office employee, was charged before a court of summary jurisdiction, on an information preferred by the appellant, with the theft of two postal packets in course of transmission. The packets contained only cigarettes and razor blades. The respondent pleaded Guilty and was committed for trial at the assizes. In the course of the hearing it was disclosed that several weeks earlier the appellant, while conducting investigations, had taken from the respondent a sum of 110*l.* At that time no accusation or charge had been made against the respondent, and it was admitted that the said sum had no connexion with the charge of theft which was eventually made against him. On the application of respondent's counsel, the justices made an order under s. 44 of the Summary Jurisdiction Act, 1879, for the return of the 110*l.* to the respondent. The appellant appealed against the order:—

Held, that the justices had no jurisdiction to make the order, for s. 44 only applied where the person from whom the property was taken was, at the time of the taking, at least accused, and in that sense charged, with some felony or misdemeanour.

CASE stated by Shropshire justices.

At a court of summary jurisdiction sitting at Wellington, Shropshire, on February 1, 1944, an information was preferred by the appellant, Arthur Archie Arnell, an officer of the Investigation Department of the General Post Office, under s. 55 of the Post Office Act, 1908, against the respondent, John Campbell Harris, a post office employee, charging him with stealing on January 13, 1944, two postal packets in course of transmission. The packets contained cigarettes and razor blades, but no money. Depositions were taken and, in the course of the cross-examination of the appellant by counsel for the respondent, the appellant admitted that on January 13, while investigating the charges mentioned, he had taken from the respondent a sum of 110*l.* and, further, that no part of that sum had any connexion with the said charges. No accusation or charge was made against the respondent at the time when the money was taken. The respondent pleaded Guilty to the charges of theft and was committed for trial at the assizes. His counsel then applied to the justices for an order under s. 44 of the Summary Jurisdiction Act, 1879 (1), directing the return to the respondent of the 110*l.*

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(1) Summary Jurisdiction Act, 1879, s. 44: "Where any "property has been taken from "a person charged before a court "of summary jurisdiction with "any offence punishable either on "indictment or on summary con- "viction, a report shall be made "by the police to such court of "summary jurisdiction of the fact "of such property having been "taken from the person charged "and of the particulars of such "property, and the court shall, if "of opinion that the property or "any portion thereof can be "returned consistently with the "interests of justice and with the "safe custody of the person "charged, direct such property, "or any portion thereof, to be "returned to the person charged, "or to such other person as he "may direct."

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The justices, having come to the conclusion that such an order would be consistent with the interests of justice and with the safe custody of the person charged, ordered that the money be returned to the respondent within seven days. The appellant appealed.

Valentine Holmes for the appellant. The justices had no jurisdiction to make this order. Section 44 of the Act of 1879 must be strictly construed, and it only applies where money has been taken from a person who has already been charged before a court of summary jurisdiction. In the present case no accusation or charge of any sort was made against the respondent when the money was taken from him. It was, therefore, not taken from a person charged before a court of summary jurisdiction. If this money has been wrongfully taken from the respondent his proper remedy is by civil proceedings. [*Reg.* v. *D'Eyncourt and Ryan* (1) and s. 29 of the Metropolitan Police Act, 1839 (now repealed) were referred to.]

The respondent did not appear and was not represented.

HUMPHREYS J. My Lord has asked me to express my opinion first. This case stated by justices of Shropshire raises the very short point, whether the justices were right in making an order that a sum of 110*l.*, which had been taken from the respondent, should be returned to him. [HIS LORDSHIP stated the facts and continued :] Counsel appearing for the respondent before the justices purported to make application for the return of the money under the terms of s. 44 of the Summary Jurisdiction Act, 1879, which gives power to justices in certain circumstances to order the return to an accused person of property taken from him. Unless that order is made, the property in question will remain in the possession of the court, as is shown by the fact that the police are required, if they have it, as they normally would as officers of the court, to retain it as being in the custody of the court. Objection was made to the handing over of that property, but the justices thought fit to make the order that the whole of the money be returned to Harris.

The argument which has been addressed to this court is that there was no power in the justices to make any such order, because the section is confined to a case where property has

(1) (1888) 21 Q. B. D. 109, 117, 122.

been taken from a person charged before a court of summary jurisdiction and that involves that it should have been taken from a person who was, when it was taken from him, charged in some form or other with some offence. It is not said that it is confined to a case where the person is actually before the court of summary jurisdiction and the property is then taken from him, for the practical reason that such a case is extremely unlikely to arise, but it is argued that the meaning of the opening words of the section must be that the section only applies where the property has been taken from a person who is at the time accused, in some form or other, of an offence for which he is brought before a court of summary jurisdiction, either for committal for trial or for adjudication on the charge. It may be that the language of the section is open to two different readings. It is unfortunate that the case has not been argued in this court on the other side, but Mr. Holmes has put before us with perfect fairness everything which, in his view, could have been argued by his opponent if he had had one, and the conclusion at which I have arrived is that the meaning which Mr. Holmes asks us to put on the section is the right one, and that the section only applies to the case of a person from whom property has been taken on or after an accusation of a charge of some nature in respect of which he subsequently comes before a court of summary jurisdiction. " The person charged " has various different meanings, and, in my opinion, it may include the case of a person who has been arrested on a charge, as he might be in a case of felony, or that of a person who has been arrested on a warrant granted by a magistrate, or even that of a person who has been summoned, that being another form of bringing a person before a court to appear and answer a charge, but I think that the section must be confined to cases where the person is at least accused, and in that sense charged, with some felony or misdemeanour.

If that be the right view, it is an end of this matter, because it is clear that when this 110*l.* was taken from the respondent no accusation was made against him of any sort or kind by any person. Therefore, it would not be right to say that this is a case where property has been taken from a person who can rightly be described as, at the time, charged with anything. For that reason I think the justices came to a wrong conclusion in thinking that they had any power to deal with this matter at all.

In *Reg.* v. *D'Eyncourt and Ryan* (1), the court had to consider the language of the Metropolitan Police Act, 1839, and the Summary Jurisdiction Act, 1879. Field J., in giving the judgment of the court, having dealt with s. 29 of the Metropolitan Police Act, 1839, continued: "It was also "contended that the order in question could be supported "under s. 44 of 42 & 43 Vict., c. 49. That section carries "still further the care and caution displayed in s. 29 of "2 & 3 Vict., c. 71. A person charged before a magistrate, who "is going to commit him for trial, is up to that time pre-"sumably innocent. It is quite uncertain up to that time "whether the money found upon him has been obtained by "fraud or not. Under those circumstances it was thought "a hardship that he should have all his money taken away "from him, and be left without the means of providing for "his defence." If counsel had been here to argue on behalf of the respondent he would, no doubt, have observed that my view of the law might lead to hardship, because it might prevent a magistrate from making an order to pay over a small sum of money to enable a man who has money of his own in his possession, to defend himself from the charge against him. If that were a conceivable position, I should agree that it would be very unfortunate, but it is notorious that as a matter of practice prosecutors who, in ninety-nine cases out of a hundred are the police, do not object to some small portion of a large sum of money being handed over to an accused person for that purpose. We have been told by Mr. Holmes that the Postmaster-General, who was the prosecutor in this case, raises no such objection. That is a very different thing from saying that the justices had power to hand 110*l.* to the respondent, that being a sum which he clearly did not require for his defence. I accept, for my part, that the principal object of this section was probably that which was suggested by Field J.

The result, in my opinion, is that the justices had no power to make this order. Therefore the question asked in the case —whether they came to a right conclusion in point of law—must be answered in the negative. The case should go back to the justices with that expression of the opinion of this court.

VISCOUNT CALDECOTE C.J. I agree. The opening words of s. 44 are capable on their strict reading of two interpretations, but I am satisfied that the narrower view which has been taken in the judgment which has just been delivered is the right one. That view is confirmed by the requirement in the section that the police should make a report on the matter before the court of summary jurisdiction makes the order which is provided for by the section.

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(1) 21 Q. B. D. 109, 119.

BIRKETT J. I am of the same opinion, and for the reasons which have been so fully stated.

Appeal allowed.

Solicitor for appellant: *Solicitor, Post Office.*

A. W. G.

BOWMAKERS, LIMITED *v.* BARNET INSTRUMENTS, LIMITED.

C. A.
1944
Oct. 18, 19, 20;
Nov. 3.

Scott and du Parcq L.JJ. and Uthwatt J.

Conversion—Sale of goods under illegal contract—Machine tools—Maximum price fixed by order—Sale at price infringing order.

No claim founded on an illegal contract will be enforced by the court, but as a general rule a man's right to possession of his own chattels will be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim. An exception to this general rule arises in cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all.

APPEAL from Croom-Johnson J.

The plaintiffs, Bowmakers, Ld., sued the defendants, Barnet Instruments, Ld., to recover damages for the conversion of certain machine tools which they alleged were their property. The tools in question were the subject of three hiring agreements between the plaintiffs and the defendants, each containing an option to purchase, dated March 18, April 15 and June 16, 1944. They were described in the statement of claim as agreements Nos. 1, 2 and 3. In each case the machines were originally the property of a man named

Smith, who was prepared to sell them to the defendants at prices which they were willing to pay, though not at once. The goods comprised in the first agreement were originally the subject of a contract of sale between Smith and the defendants, but this contract was rescinded. Eventually it was arranged in every case, for the convenience of the defendants, that the defendants should obtain possession of the machines, not by a direct purchase from Smith, but under a hire-purchase agreement from the plaintiffs. In pursuance of this arrangement Smith sold the goods to the plaintiffs, and the plaintiffs entered into the three agreements with the defendants. The contracts between the plaintiffs and the defendants were in a familiar form. Each of them contained a provision for the monthly payment of hire and further provided that " if the hirer shall duly make the said payments " and strictly observe and perform all the terms and conditions " on his part herein contained then the hirer shall thereupon " have the option of purchasing the said chattels for the sum " of ten shillings." The defendants after making some, but by no means all the agreed payments, sold for their own advantage, and so converted to their use, all the machines except that one which was the subject of agreement 2, and this latter they also converted to their own use by refusing to deliver it up to the plaintiffs on demand. They maintained, however, that the plaintiffs had no remedy against them.

The goods comprised in agreements 1 and 2 were new machine tools. On October 4, 1940, the Minister of Supply, in exercise of powers conferred on him by regs. 55 and 98 of the Defence (General) Regulations, 1939, made an order (St. R. & O., 1940, No. 1784), which admittedly applied to them. The material clause of the order was as follows : " No person shall " pay or receive any price (except a provisional price subject to " any adjustment that may be required upon determination " of the maximum price) for any machine tool produced in the " United Kingdom and delivered or to be delivered in the " United Kingdom after the coming into force of this order " under a contract of sale whenever made (*a*) until a maximum " price for that machine tool shall have been provided by a " special or general direction issued by the Minister of Supply, " or (*b*) in excess of the maximum price so provided." By an amendment introduced by a later order the application of this prohibition was limited to new machine tools. It was a matter of dispute at the trial whether a maximum price for new machine tools such as were included in agreements 1 and 2 had in fact been provided. The defendants said that there had been an infringement of that order. The third agreement dealt solely with a machine tool which was "used." As to that agreement, the defendants relied on another order of the Minister of Supply (St. R & O., 1940, No. 1374), which provided that no person should "in the United Kingdom at any time after "August 17, 1940, dispose of or agree or offer to dispose of "any used machine tool, except under the authority of a "licence granted to him by the Minister of Supply." It further provided that the expression "dispose of" should include any disposal of (*a*) ownership or any proprietary interest or (*b*) the right to possession, or (*c*) possession, whether or not accompanied by any disposal or acquisition of ownership or of any proprietary interest or of the right to possession. The plaintiffs had no such licence to dispose of the machine tool in question. They had, therefore, infringed the order, if not by buying from Smith, the previous owner of the tool, then certainly by themselves hiring out the chattel to the defendants. This illegality, it was contended, must have the same result as the offence committed in respect of the new machines, namely, that the plaintiffs had no remedy against the defendants. Croom-Johnson J. held that no illegality had been proved in respect of any of the hiring agreements, and, accordingly, entered judgment for the plaintiffs against the defendants for damages for conversion. The defendants appealed.

Stenham for the plaintiffs.
Gallop and *R. T. Paget* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 3. DU PARCQ L.J. read the following judgment of the court. In this case the plaintiffs have obtained a judgment against the defendants for damages for conversion of certain machine tools, the property of the plaintiffs. But for the defence of illegality which has been raised, there is no answer to the plaintiffs' claim. It is said, however, that the claim is one which the court, having regard to the circumstances, ought not to enforce.

[His Lordship stated the facts and continued :] It was a matter of dispute at the trial whether a maximum price for new machine tools such as were included in agreements 1 and 2 had in fact been "provided" within the meaning of that term in the Order, No. 1784 of 1940. It was said by the defendants that none had been provided ; by the plaintiffs that there had been special directions "providing" maximum prices. In this court it was not thought necessary to examine the evidence on the point, since (as will appear) the argument put forward by the defendants can be based equally well on either view of the facts. That argument is as follows : First, with regard to agreements 1 and 2, it is said that the sales by Smith to the plaintiffs were not made at a "provisional" price, and it was neither agreed nor intended that the purchase price which was fixed should be subject to adjustment. This was an infringement of the order quoted. If no maximum price was ever fixed, it still remained an infringement. If certain directions which were proved to have been given to some manufacturers were to be considered as "special directions" by which a maximum price was provided, then admittedly the price paid to Smith in every case greatly exceeded the maximum price. On either view, therefore, there was an infringement of the order. It had to be conceded that the hiring agreements did not in themselves transgress this order, but it was contended, and with much force, that any illegality which attached to the anterior contract of sale must in the circumstances of this case affect the hiring agreements, since these latter agreements were negotiated by the plaintiffs, the defendants and Smith, acting in concert, with a view to ensuring the payment to Smith of a price which could not legally be paid. It is right to add that neither the plaintiffs nor the defendants had any knowledge of the order, so that, if they erred, their error was involuntary, but this, the defendants say, is immaterial. The defendants obtained possession of the machinery as the result of a bargain to procure the commission of a criminal offence, and hence, it was said, they and the plaintiffs, however venial their offence, had been engaged in nothing less than a criminal conspiracy. The plaintiffs, therefore, should be driven from the judgment seat, with the result, fortunate or unfortunate according to the point of view, that the defendants would escape from the transaction without loss, and without even suffering the reproaches of an uneasy conscience. [His Lordship then set out the order on which the defendants relied as having been infringed by the dealings with the used machine tool which was the subject of the third agreement and continued] : Neither Smith or the plaintiffs had the authority of such a licence to dispose of the machine tool in question. The plaintiffs had, therefore, infringed the order, if not by buying from Smith, certainly by themselves hiring out the chattel to the defendants. The result of this illegality, it was contended, must have the same satisfactory consequences for the defendants as the offence committed in respect of the new machines.

Croom-Johnson J., who tried the case, came to the conclusion that no illegality had been proved in respect of any of the hiring agreements. As to the new machine tools, he held that no harm had been done by fixing a price for the sale from Smith to the plaintiffs. As we understand his judgment, his view was that, if parties to a contract fix a price, the order is not transgressed since the price on which they have agreed can subsequently be treated as a provisional price and suitably adjusted. With regard to the used machine, the learned judge was of opinion that Smith, and Smith alone, had broken the law, since, in his view, the plaintiffs were under no obligation to satisfy themselves that Smith had been licensed by the minister. With great respect to the learned judge, we confess that his reasoning does not appear to us to be convincing. If, as we think, it is plain that Smith and the plaintiffs agreed a price for the new machines which was not intended by either of them to be a "provisional" price, we find it difficult to escape the conclusion that they both infringed the order when that price was paid and received. As to the used machine tool, the learned judge would appear to have overlooked the fact that the plaintiffs themselves disposed of it by their agreement with the defendants, so that their ignorance of the fact that Smith was selling without "the authority of a licence" could not avail them. The view which we take of the case makes it unnecessary to pass a final judgment on the question whether, on the true construction of the orders, the suggested offences have been proved, but we will assume in favour of the defendants that the three hiring agreements were all, as they allege, and for the reasons which they give, affected by illegality.

The question, then, is whether in the circumstances the plaintiffs are without a remedy. So far as their claim in conversion is concerned, they are not relying on the hiring agreements at all. On the contrary, they are willing to admit for this purpose that they cannot rely on them. They simply say that the machines were their property, and this, we think, cannot be denied. We understood Mr. Gallop to concede that the property had passed from Smith to the plaintiffs, and still remained in the plaintiffs at the date of the conversion. At any rate, we have no doubt that this is the legal result of the transaction and we find support for this view in the dicta of Parke B. in *Scarfe* v. *Morgan* (1).

Why then should not the plaintiffs have what is their own? No question of the defendants' rights arises. They do not, and cannot, pretend to have had any legal right to possession of the goods at the date of the conversion. Their counsel has to rely, not on any alleged right of theirs, but on the requirements of public policy. He was entitled, and bound, to do so, although, as Lord Mansfield long ago observed, "The objection, "that a contract is immoral or illegal as between plaintiff "and defendant, sounds at all times very ill in the mouth of "the defendant." "No court," Lord Mansfield added, "will "lend its aid to a man who founds his cause of action upon an "immoral or an illegal act:" *Holman* v. *Johnson* (2). This principle, long firmly established, has probably even been extended since Lord Mansfield's day. Mr. Gallop is, we think, right in his submission that, if the sale by Smith to the plaintiffs was illegal, then the first and second hiring agreements were tainted with the illegality, since they were brought into being to make that illegal sale possible, but, as we have said, the plaintiffs are not now relying on these agreements or on the third hiring agreement. Prima facie, a man is entitled to his own property, and it is not a general principle of our law (as was suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealings between them, the true owner can never be allowed to recover those goods by an action. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. The suggestion that it exists is not, in our opinion, supported by authority. It would, indeed, be astonishing if (to take one instance) a person in the position of the defendant in *Pearce* v. *Brooks* (3), supposing that she had converted the plaintiff's brougham to her own use, were to be permitted, in the supposed interests of public policy, to keep it or the proceeds of its sale for her own benefit. The principle which is, in truth, followed by the courts is that stated by Lord Mansfield, that no claim founded on an illegal contract will be enforced, and for this purpose the words "illegal contract" must now be understood in the wide sense which we have already indicated and no technical meaning must be ascribed to the words "founded on "an illegal contract." The form of the pleadings is by no means conclusive. More modern illustrations of the principle on which the courts act are *Scott* v. *Brown, Doering, McNab & Co.* (1) and *Alexander* v. *Rayson* (2), but, as Lindley L.J. said in the former of the cases just cited (3): "Any rights which "[a plaintiff] may have irrespective of his illegal contract "will, of course, be recognized and enforced."

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(1) (1838) 4 M. & W. 270, 281.
(2) (1775) 1 Cowp. 341, 343.
(3) (1866) L. R. 1 Ex. 213.

In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.

Mr. Gallop sought to derive assistance from the decision of the Court of Queen's Bench in *Taylor* v. *Chester* (4). The decision there was, however, entirely consonant with the view which we have expressed. It differed from the present case in one essential respect, since in that case the defendant had prima facie a right to possession of the half-note which the plaintiff claimed. She was holding it as a pledge to secure the payment of money which remained due. The plaintiff could only defeat her plea by showing that the money due had been lent for an immoral purpose, and this could not avail him since he was in pari delicto with her. The judgment of the court, delivered by Mellor J., makes it plain that this was the ratio of the decision. "The plaintiff," said Mellor J. (5), "no doubt, "was the owner of the note, but he pledged it by way of security "for the price of meat and drink provided for, and money "advanced to, him by the defendant. Had the case rested "there, and no pleading raised the question of illegality, a valid "pledge would have been created, and a special property

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(1) [1892] 2 Q. B. 724.
(2) [1936] 1 K. B. 169.
(3) [1892] 2 Q. B. 729.
(4) (1869) L. R. 4 Q. B. 309.
(5) Ibid. 314.

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"conferred upon the defendant in the half-note, and the "plaintiff could only have recovered by showing payment or a "tender of the amount due. In order to get rid of the defence "arising from the plea, which set up an existing pledge of the "half-note, the plaintiff had recourse to the special replication, "in which he was obliged to set forth the immoral and illegal "character of the contract upon which the half-note had been "deposited. It was, therefore, impossible for him to recover "except through the medium and by the aid of an illegal "transaction to which he was himself a party. Under such "circumstances, the maxim 'in pari delicto potior est conditio "'possidentis' clearly applies, and is decisive of the case." The Latin maxim which Mellor J. cited must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of goods after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the circumstances are such that the court will refuse to assist either party, the consequence must, in fact, follow that the party in possession will not be disturbed. As Lord Mansfield said in the case already cited (1), the defendant then obtains an advantage "contrary to the real justice," and, so to say, "by accident."

It must not be supposed that the general rule which we have stated is subject to no exception. Indeed, there is one obvious exception, namely, that class of cases in which the goods claimed are of such a kind that it is unlawful to deal in them at all, as for example, obscene books. No doubt, there are others, but it is unnecessary, and would we think be unwise, to seek to name them all or to forecast the decisions which would be given in a variety of circumstances which may hereafter arise. We are satisfied that no rule of law, and no considerations of public policy, compel the court to dismiss the plaintiffs' claim in the case before us, and to do so would be, in our opinion, a manifest injustice. The appeal will be dismissed, with costs.

Appeal dismissed.

Solicitor for defendants: *L. A. Hart.*

Solicitors for plaintiffs: *Field, Roscoe & Co., for W. Parkinson Curtis, Bournemouth.*

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(1) 1 Cowp. 343.

R. F. S.

Distinguished. BENNETT *v.* MILLETT. [1949] 1 K. B. 362

JONES *v.* LOWE.

1944
Nov. 3.

Contract—Commission—House agent—Commission payable on "introducing a purchaser"—Ready and willing purchaser introduced—Binding contract to purchase not completed.

Where, by the terms of an agreement, a house-agent is to be paid a commission in the event of his "introducing a purchaser" of property, it is not a sufficient performance of his obligation if he introduces a person who is able, ready, and willing to purchase, but who does not enter into a legal and binding agreement to do so, because, after a draft contract has been sent to his solicitors the proposed vendor withdraws the property from sale. Nor is the house-agent entitled to payment on a quantum meruit.

Observations in *Luxor (Eastbourne), Ld.* v. *Cooper* [1941] A. C. 108, applied.

ACTION tried by Hilbery J.

By a verbal agreement, made on July 30, 1943, the defendant, Dorothy Lowe, who was the owner of a house, requested the plaintiff, C. Jones, a house and estate agent, to find a purchaser for it at a price eventually fixed at 3,150*l.* In a letter to the defendant of the same date confirming the agreement the plaintiff wrote "In the event of my introducing "a purchaser, I shall look to you for the payment of the usual "commission in accordance with the scale fixed by the "Auctioneers and Estate Agents Institute." The defendant did not dissent from the terms of the agreement as so expressed, and on December 28, 1943, the plaintiff introduced to her one Cooke who was ready and willing to purchase the house at the stipulated price and paid a deposit thereon. On February 17, 1943, the defendant's solicitors sent a draft contract to Cooke's solicitors, regarding the terms of which it was not anticipated that any question would arise between the legal advisers to the parties. On February 21, 1944, the defendant informed Cooke that in consequence of domestic difficulties she had withdrawn the property from sale. The plaintiff brought an action against the defendant claiming damages for breach of contract on the footing that he had fulfilled his obligation under his contract with the defendant by introducing a ready and willing purchaser, and was, therefore, entitled to be paid the agreed commission. In the alternative, he claimed 81*l.* 5*s.* 0*d.* on a quantum meruit.

Wrightson for the plaintiff. The plaintiff is entitled to be paid the agreed commission. By the terms of the contract it was to be payable in the event of his introducing "a "purchaser," which means someone who is ready and willing to purchase and not necessarily one who does in fact purchase.

Solley for the defendant. The agreement between the parties is expressed in the terms of the plaintiff's letter of July 30, 1943, which were accepted by the defendant. In effect those terms were: "I am to be paid only if I introduce "a person who in fact becomes a purchaser or enters into "a binding agreement to purchase." In the case of such a contract it is not open to the court to imply any other term of remuneration and still less an agreement that the plaintiff should be entitled to payment on a quantum meruit. It is clear from the speeches of Lord Russell of Killowen and Lord Romer in *Luxor (Eastbourne) Ld.* v. *Cooper* (1) that "a "purchaser" in such a contract as the present means one who has at least entered into a legal and binding contract to purchase and is not merely ready, able and willing to do so. The same case is also an authority for the proposition that there cannot be read into the contract an implied term that the vendor of the property will not himself do anything to prevent the transaction from going through.

HILBERY J. stated the facts and continued: The first question to be decided is whether the plaintiff has performed his part of the contract so that the commission claimed has become due and payable under it? That depends on the construction of the words which define and describe what he was employed to do. The plaintiff himself selected the language in which his obligation was expressed when he wrote to the defendant "in the event of my introducing a purchaser, "I look to you for the payment of the usual commission." What is the proper construction to be placed on the words "a purchaser"? and what had the plaintiff to do to "introduce a purchaser"? Had I been free of authority I should have thought that there were strong grounds for saying that what every owner of a house who desired to sell it expected a house agent to do, was to bring the property fairly to the notice of persons who resorted to him for houses and endeavour to persuade one of them to buy it. If the agent introduces someone who is perfectly willing to go through with the purchase at a price which will satisfy the vendor, it would seem that the agent has done everything that the parties contemplate that he should do, for they do not contemplate that the agent should have anything to do with the actual completion of the transaction. He is to find a person who will pay the price which is asked for the property, and the contract is entered into on the basis that the person so found will be the person to whom the owner of the property will sell.

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(1) [1941] A. C. 108.

It seems to me hard, if an agent has done to the full extent what the parties contemplated that he should do, that he should not be entitled to say: " I have done what I contracted " to do because I have introduced someone willing to purchase " although he never in fact has become the actual purchaser." I do not feel, however, that it is open to me to put that construction on the words of the contract in the present case because I think that the observations made in the House of Lords, and particularly those of Lord Russell of Killowen and Lord Romer in *Luxor* (*Eastbourne*) *Ld.* v. *Cooper* (1), show that they were clearly of opinion that if an agent is employed to introduce a purchaser for a house and before the purchaser has entered into a binding and legal contract, the house is withdrawn from the market, the agent cannot say that he has earned his commission. Lord Russell of Killowen (2) said: " I do not assent to the view, which I think was the view of " the majority in the first *Trollope* case (3), that a mere " promise by a property owner to an agent to pay him a com" mission if he introduces a purchaser for the property at a " specified price, or at a minimum price, ties the owner's " hands, and compels him (as between himself and the agent) " to bind himself contractually to sell to the agent's client " who offers that price, with the result that if he refuses the " offer he is liable to pay the agent a sum equal to or less than " the amount of the commission either (*a*) on a quantum " meruit or (*b*) as damages for breach of a term to be implied " in the commission contract. As to the claim on a quantum " meruit, I do not see how this can be justified in the face of " the express provision for remuneration which the contract " contains. This must necessarily exclude such a claim, " unless it can (upon the facts of a particular case) be based " upon a contract subsequent to the original contract, and " arising from some conduct on the part of the principal. As

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(1) [1941] A. C. 108.

(2) [1941] A. C. 125.

(3) [1934] 2 K. B. 436.

"to the claim for damages, this rests upon the implication of "some provision in the commission contract, the exact terms "of which were variously stated in the course of the argument, "the object always being to bind the principal not to refuse "to complete the sale to the client whom the agent has introduced. I can find no safe ground on which to base the "introduction of any such implied term. Implied terms, as "we all know, can only be justified under the compulsion of "some necessity. No such compulsion or necessity exists in "the case under consideration. The agent is promised a "commission if he introduces a purchaser at a specified or "minimum price. The owner is desirous of selling. The "chances are largely in favour of the deal going through, if "a purchaser is introduced. The agent takes the risk in "the hope of a substantial remuneration for comparatively "small exertion. . . . The position will no doubt be different "if the matter has proceeded to the stage of a binding contract "having been made between the principal and the agent's "client. In that case it can be said with truth that 'a "'purchaser' has been introduced by the agent; in other "words the event has happened upon the occurrence of which "a right to the promised commission has become vested in "the agent. From that moment no act or omission by the "principal can deprive the agent of that vested right."

I do not think that anyone could doubt that the learned lord was there expressing the view that, if an agent's commission is payable on his introducing a purchaser, he does not earn that commission merely by introducing someone who is ready and willing to purchase, but only earns it if the person who is ready and willing to purchase goes so far as to sign a legal contract binding him to go through with the purchase. It is clear in the present case that the proposed purchaser did not enter into the legal and binding contract which was contemplated because the matter had only got so far as a draft contract passing between the solicitors.

Later in his speech, Lord Russell of Killowen (1) said: "It "is possible that an owner may be willing to bind himself to "pay a commission for the mere introduction of one who "offers to purchase at the specified or minimum price; but "such a construction of the contract would in my opinion "require clear and unequivocal language." There, again, having regard to the former passage I have read, the learned

(1) [1941] A. C. 129.

lord is drawing a distinction between the case of "introducing "a purchaser" and one in which the contract is for the introduction of a person who is "willing to buy." Lord Romer was clearly of the same opinion as Lord Russell of Killowen. He said (1): "Where an owner of property employs an agent "to find a purchaser, which must mean at least a person who "enters into a binding contract to purchase, is it an implied "term of the contract of agency that, after the agent has "introduced a person who is ready, willing and able to "purchase at a price assented to by the principal, the principal "shall enter into a contract with that person to sell at the "agreed price subject only to the qualification that he may "refuse to do so if he has just cause or reasonable excuse for "his refusal?" In that passage Lord Romer is again contrasting the situation of an agent employed to find a purchaser who becomes entitled to his commission on introducing a purchaser who enters into a binding contract with that of an agent who has only got so far as to find someone who is ready, willing and able to purchase, and his observations afford the clearest indication that he was of the same opinion as Lord Russell of Killowen. It seems to me that I should be flying in the face of those high authorities if I were to construe the contract for the payment of commission on the introduction of a purchaser, in the present case as having been performed by the plaintiff by the introduction of a purchaser who was ready, able and willing to purchase, but who did not in fact proceed to the signing of a binding contract.

Having failed on the contract, is the plaintiff entitled to recover on a quantum meruit? He reduced into writing the terms of the contract which were accepted by the defendant, and in those circumstances the authorities are overwhelming that there is no room for the implication of any promise on the part of the defendant to pay a reasonable remuneration, which would give the plaintiff in law a right to recover on a quantum meruit. The result is that the plaintiff's claim under both heads must fail and there will be judgment for the defendant with costs on the High Court scale.

Judgment for defendant.

Solicitors for plaintiff: *Rutland & Crauford, for C. R. Thomas & Son, Maidenhead.*

Solicitors for defendant: *H. L. Lumley & Co.*

P. B. D.

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(1) [1941] A. C. 154.

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HULLAND *v.* WILLIAM SANDERS & SON.

1944
Oct. 5, 6, 9;
Nov. 17.

Lord Greene M.R., MacKinnon and du Parcq L.JJ.

Emergency legislation—Conditions of employment—Rate of wages—Rate fixed by National Joint Council of the Building Trade—Underpayment—Workman's claim for arrears—Right of action—Conditions of Employment and National Arbitration Order, 1940 (*St. R. & O.,* 1940, 1305), *art.* 5, *para.* 1.

Article 5, para. 1, of the Conditions of Employment and National Arbitration Order, 1940, provides that where in any trade or industry in any district there are in force terms and conditions of employment which have been settled by the "machinery of "negotiation or arbitration to which the parties are organizations "of employers and trade unions representative respectively of "a substantial proportion of the employers and workers engaged "in that trade or industry in that district," all employers in that trade or industry in that district "shall observe" those terms and conditions.

Where such an employer has paid a lower rate of wages than those so settled a right of action will not arise under art. 5, para. 1, enabling the worker to sue for and recover either the arrears of wages or damages for breach of the statutory duty. The question whether an employer has failed to pay the settled rate of wages may, by art. 5, para. 3, be reported to the minister by any organization or trade union and shall then be referred by him to the National Arbitration Tribunal established under part I. of the order. Under para. 4 and art. 2, para. 5, it is only where an award has been made by the tribunal that, from a date fixed as there provided, it becomes an implied term of the contract that the rate of wages shall be in accordance with the award so as to give the worker a right to sue.

Appeal from Humphreys J.

The plaintiff, Frederick C. Hulland, was employed between July 13, 1940, and August 24, 1942, as a mason by the defendants, William Sanders & Son, who carried on business as building and public works contractors in and around South Molton, Devonshire, a district forming part of the south-western region of the National Joint Council for the building industry. In this trade and district there were terms and conditions of employment which, as the plaintiff alleged, were settled by machinery of negotiations between organizations of employers and trade unions representative respectively of substantial proportions of the employers and workmen engaged in the trade in the district within the meaning of art. 5 of the Conditions of Employment and National Arbitration Order, 1940 (1), being an order made under reg. 58AA of the Defence (General) Regulations, 1939, with a view to preventing interruptions of work by trade disputes. During the period in question, the plaintiff alleged he was paid by the defendants lower wages than those fixed by the council, and he brought this action for arrears of 103*l.* 15*s.* 0*d.*, being the amount by which the wages paid were less than those fixed for South Molton under the order. He alleged that, in failing to pay the proper wages, the defendants had acted in breach of art. 5, para. 1, of the order, and, alternatively, he claimed damages for breach of statutory duty. The rates of wages fixed by the National Joint Council for the Building Trade had been agreed on behalf of the employers by their federations to which six hundred and twenty employers in the south-western district employing nine-tenths of the employees in that district were affiliated. None of the forty-three master builders in South Molton borough or rural council had during the period been members of the federations. By their defence the defendants denied that any terms or conditions had been settled, and they

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(1) By Conditions of Employment and National Arbitration Order, 1940, art. 2, para. 1: "If "any trade dispute exists or is "apprehended, that dispute, if "not otherwise determined, may "be reported to the minister by "or on behalf of either party to "the dispute . . . ."

Para. 2: "The minister shall "consider any dispute so reported "to him as aforesaid and if in his "opinion suitable means for "settling the dispute already "exist by virtue of the provisions "of any agreements to which the "parties are organizations repre"sentative of employers and "workers respectively, he shall "refer the matter for settlement "in accordance with those pro"visions; so, however, that where ". . . . there is a failure to reach "a settlement . . . . the minister "may cancel the reference and "substitute therefor a reference to "the National Arbitration "Tribunal."

Para. 5: "Any agreement, "decision or award made by virtue "of the foregoing provisions of "this article shall be binding on "the employers and workers to "whom the agreement, decision "or award relates and, as from the "date of such agreement, decision "or award or as from such date as "may be specified therein . . . . "it shall be an implied term of the "contract between the employers "and workers . . . . that the "rate of wages to be paid and the "conditions of employment to be "observed under the contract "shall be in accordance with such "agreement, decision or award "until varied by a subsequent "agreement, decision or award."

Art. 5, para. 1: "Where in any "trade or industry in any district "there are in force terms and con"ditions of employment which "have been settled by machinery "of negotiation or arbitration to "which the parties are organiza"tions of employers and trade set up the further defence (among others) that if the terms and conditions had been so settled and they had committed a breach of art. 5, para. 1, it conferred no right of action on the plaintiff. Humphreys J. held that the plaintiff was entitled to recover by reason of the lower wages paid and ordered that he should recover an amount to be ascertained by the official referee, if not agreed between the parties. The defendants appealed. On the appeal, the only question decided by the court was whether the workman had a right of action and no argument on other points is set out.

Sellers K.C. and *H. M. Pratt* for the defendants. Under the Conditions of Employment and National Arbitration Order, 1940, art. 5, para. 3, the National Arbitration Tribunal is the sole tribunal to which any dispute arising under art. 5 must be referred. It is only after an award has been made that an enforceable claim arises: see art. 5, para. 4, which provides

"unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry in that district (hereinafter referred to as 'recognised terms and conditions') all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions as are not less favourable than the recognised terms and conditions."

Para. 3: "If any question arises as to the nature, scope or effect of the recognised terms and conditions in any trade or industry in any district or as to whether an employer is observing the recognised terms and conditions or is observing terms and conditions which are not less favourable than the recognised terms and conditions, that question may be reported to the minister by any organization of employers or any trade union which in the opinion of the minister is an organization or trade union that habitually takes part in the settlement of wages and working conditions in the trade or industry concerned, and if so reported the question shall thereupon be dealt with in the same manner as if it were a trade dispute referred to the minister under the provisions of art. 2 of this order and the provisions of that article shall apply accordingly . . . ."

Para. 4: "Where an award has been made by the National Arbitration Tribunal then as from the date of the award or from such date as the tribunal may direct not being earlier than the date on which the question to which the award relates first arose, it shall be an implied term of the contract between the employer and workers to whom the award applies that the rate of wages to be paid and the conditions for employment to be observed under the contract shall, until varied by a subsequent agreement, decision or award . . . , be in accordance with the award."

that the rate of wages made payable and the conditions of employment to be observed shall become an implied term of the contract. Article 5, para. 1, does not create a statutory obligation which can be enforced by action. It sets a standard to be invoked. For any person to be made liable his duty must be clear and unambiguous and that is not so under art. 5, para. 1, taken alone. Further, there can be no right of action till the procedure provided for in the order has been complied with. Lastly, as the conditions are made enforceable by penalty, there is no right of action except that which arises after an award by reason of the wages and conditions imposed being read into the contract of employment. There are no words preserving a right of action, although the penalty is imposed, as in other Acts dealing with kindred topics: see, for example, the Agricultural Wages (Regulations) Act, 1924, s. 7. The remedy is to bring the matter before the tribunal under art. 2 and art. 5, para. 5. [They referred to *Jones* v. *Harris* (1).]

Morris K.C. and *Fox-Andrews* for the plaintiff. If a workman had not a right of action under art. 5, para. 1, he might well find himself without any remedy, for if the employer simply admitted non-compliance with the conditions of employment, no question would arise which would enable the plaintiff to resort to arbitration under art. 5, para. 3. Even in a case where there is a submission to the arbitration tribunal and an award is made, an action may be necessary to enforce payment of the unpaid wages under the award. The plaintiff has a clear right of action, for it is to be noted that under art. 5, para. 1, it is provided that the employers in the district "shall observe" the recognized terms and conditions. There is, then, no need for an arbitration award to impose the obligation. Further, the fact that there is a penalty for breach of the article does not deprive the individual workman of his right of action for money due: *Groves* v. *Lord Wimborne* (2). Article 5, para. 1, imports a statutory term into the workman's contract on which he can sue. The obligation to pay higher wages is imperative and gives the workman a right of action. *Gutsell* v. *Reeve* (3); *George* v. *Mitchell & King* (4); *Shepherd* v. *Hills* (5).

H. M. Pratt, for the defendants, replied.

Cur. adv. vult.

(1) [1927] 1 K. B. 425.
(2) [1898] 2 Q. B. 402.
(3) [1936] 1 K. B. 272.
(4) [1943] 1 All E. R. 233.
(5) (1855) 11 Exch. 55.

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Nov. 17. The judgment of the court was read by DU PARCQ L.J. The plaintiff's claim in this case was founded on the proposition that, if he could satisfy the court that his employer had failed to comply with art. 5, para. 1, of the order in question, he would be entitled under the order to judgment for an amount representing the wages which his employer ought to have, and had not, paid to him. It was one of the defendants' contentions that, on the true construction of the order, no action would lie under it for wages at the suit of a workman except where, by its express provisions, a term is to be implied in the contract of service that a certain rate of wages is to be paid. Humphreys J. disposed of the point shortly in these words: "In my view this legislation, though in the form of a "Defence Regulation, is so clearly intended to benefit the "operative by ensuring to him a minimum wage per hour that "a breach of it ought to be construed as giving him the right "to sue for his unpaid wages as well as subjecting the erring "employer to a penalty. I am of opinion, therefore, that "whether the claim is for money due and owing, or for damages "for breach of statutory duty, the plaintiff is entitled to "recover in law if he succeeds upon the facts."

The plaintiff relies on the general proposition stated by Parke B. in *Shepherd* v. *Hills* (1): "There is no doubt that "wherever an Act of Parliament creates a duty or obligation "to pay money, an action will lie for its recovery, unless the "Act contains some provision to the contrary." This proposition is unquestionably correct, if its final words are understood as expressing the reservation that an action will not be held to lie for the recovery of such a sum when the enactment, read as a whole, manifests a contrary intention. It is thus necessary to look closely at the language of the order and to consider the words on which the plaintiff relies in association with their context. The order was made by the minister in pursuance of Defence (General) Regulation 58AA, "with a view to preventing "work being interrupted by trade disputes." Part I. of the order makes provision for establishing a tribunal for the settlement of trade disputes, part II. for prohibiting strikes and lock-outs, and part III. "for requiring employers to observe "such terms and conditions of employment as may be deter-"mined in accordance with the order to be, or to be not less "favourable than, the recognized terms and conditions." The power to deal with each of these matters is conferred on

(1) 11 Exch. 55, 67.

the minister by para. 1 (*a*), (*b*) and (*c*) of the regulation respectively.

The plaintiff founds his claim on the words of art. 5, para. 1, in part III. of the order: " all employers . . . . shall observe " the recognized terms and conditions." In our opinion, the argument put forward on his behalf, which the learned judge accepted, gave too little attention to the remaining provisions of art. 5, in particular, paras. 3 and 4 of that article. The article must be read in the light of the words which we have quoted from reg. 58AA, para. 1 (*c*), to which part III. of the order is referable. The terms and conditions of employment are to be " determined in accordance with the order." Part I. of the order which is referable to reg. 58AA, para. 1 (*a*), has enacted (by art. 2, para. 5) that it shall be an implied term of a contract of employment to which an agreement, decision or award, made under art. 1, relates, that the rate of wages to be paid shall be in accordance with the agreement, decision or award. Now, by part III., art. 5, para. 3, provision is made for the determination of any question that may arise " as to the nature, scope or " effect of the recognized terms and conditions in any trade " or industry in any district or as to whether an employer is " observing the recognized terms and conditions or is observing " terms and conditions which are not less favourable than " the recognized terms and conditions." This question (under the same paragraph) may be reported to the minister by an organization of employers or a trade union, and be by him referred to the National Arbitration Tribunal. Here, again, as in the case of an agreement, decision or award under part I., a term is to be implied in contracts of employment governed by the award of the tribunal (art. 5, para. 4). The implication of such a term will necessarily give the workman a right under his contract to the wages fixed by the tribunal.

In spite of the persuasive argument addressed to us on behalf of the plaintiff, we are satisfied that to accept it would be to ignore, or to render in large part nugatory, the carefully framed provisions of these paragraphs of art. 5. When the order is viewed as a whole, it is, we think, manifest that the provisions by which terms are to be implied in contracts of employment are essential to its scheme. Their principal, if not their only, object must be to give the workman a contractual right, and so a right to sue. If he had such a right, apart from these provisions, there would hardly be any need for them, and there would certainly be no need for the careful provision which, in fact, we find as to the date from which the implied term is to be incorporated in the contract. It must in all cases be so incorporated at least from the date of the award. So much is mandatory, but power is given to the tribunal to make it operative from an earlier date, subject to the limitation that this is not to be a date earlier than that on which the question to which the award relates first arose. It would appear that by the joint operation of art. 5, para. 3, and art. 2, para. 1, this latter date is one to be fixed by the minister. All this is meaningless unless the tribunal is being entrusted, and entrusted to the exclusion of all other tribunals, with what is in effect the power of deciding from what date (within the prescribed limits) the workman is to be entitled to sue his employer for wages at the rate which the award is ordering him to pay. It is said that the general words of art. 5, para. 1, create a statutory duty, and that from the moment when the employer is in breach of that duty he is liable to be sued by any workman affected by it. If the workman's right to sue arises in this way independently of any implied term which an award may bring into existence, it would seem that, in the event of a reference to the National Arbitration Tribunal under art. 5, para. 3, neither a direction given under art. 5, para. 4, nor the fact that the tribunal designedly abstained from giving any direction under that paragraph, would prevent the workman from successfully suing under art. 5, para. 1, for arrears of wages in respect of a period anterior to any date fixed by the tribunal, or to the date of the award if the tribunal fixed no date. On this view (for which counsel for the plaintiff did not hesitate to contend) any individual workman might await a reference to the National Arbitration Tribunal, and then, if the award were given against the employer, lawfully demand payment from the employer of arrears of pay according to the quantum of wages fixed by the award, without regard to the date from which the implied term began to be operative, and subject only (as to time) to the statutes of limitation. The elaborate provisions introduced for the protection of the employer would thus be rendered nugatory. Although he might have acted in good faith, honestly believing that the terms and conditions which he observed were no less favourable than those in force, or, it may be, believing that, on the true construction of the order, no terms and conditions could properly be held to be "in force" in his district, he might be exposed to a multitude of actions in which the court would be bound to order him to pay sums greatly exceeding any amount which, in the considered judgment of the National Arbitration Tribunal, he ought justly to be called on to pay.

Other remarkable consequences would follow the adoption of the plaintiff's contention. If a workman is entitled to sue for his wages under art. 5, para. 1, although there has been no award by the National Arbitration Tribunal, then it must follow that the employer will be entitled to defend himself (as, indeed, the defendants in the present case have sought to defend themselves) by showing that the terms and conditions which they observe are not less favourable than the recognized terms and conditions. This is a question partly of fact and partly of opinion, about which, in some cases, not all judges, whether of the High Court or of county courts, and certainly not all juries, could reasonably be expected to come to the same conclusion, so that many conflicting decisions might be given. Moreover, it might easily happen, if the plaintiff is right, that, while proceedings were on foot against an employer at the suit of a workman, the National Arbitration Tribunal was contemporaneously engaged in exercising its jurisdiction under paras. 3 and 4. If the court in which the employer was being sued, and the tribunal, arrived concurrently, as they well might, at different and irreconcilable decisions, the remarkable result might follow that the workman would obtain a judgment for an amount larger than that which a term now lawfully (and possibly retrospectively) to be implied in his contract entitled him to demand. The confusion to which the suggested construction would inevitably lead is in itself an argument against its adoption.

There is a further objection to the plaintiff's claim. When once a question has arisen (and, as we will assume, has been raised bona fide) under para. 3, the only tribunal on which jurisdiction to decide it is expressly conferred by the order is the National Arbitration Tribunal. Until the question has been decided by that body, the employers and workmen concerned cannot be sure how it is to be answered, and until such a decision has been given it is difficult to see how the employer's duty to "observe the recognized terms and conditions" can arise. Were the order to be read as meaning that an employer must be held to have failed in that duty if, on his being sued by an employee, a judge or jury decide this question adversely to him, the order would seem to be inconsistent with the regulation which (as we have pointed out) empowers the minister to

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make provision "for requiring employers to observe such "terms and conditions of employment as may be determined "*in accordance with the order* to be, or to be not less favourable "than, the recognized terms and conditions." It would then appear that the minister had exceeded his authority, and, if there be any ambiguity in the order, we are bound to give to it that meaning which is consistent with its being a proper exercise of the minister's powers.

We would add these further observations. The order is contemplating, at least primarily, not separate agreements made between individuals, but terms arrived at after negotiations between associations of employers and of workmen. We apprehend that the National Arbitration Tribunal may properly regard such collective bargains (if we may so term them) as a whole when they compare their terms and conditions with the terms and conditions which a particular employer is observing. A purely hypothetical instance will illustrate this. Let it be supposed that the terms and conditions in force in a district provide for the payment of a certain sum per hour, and that an employer who does not observe those terms pays his workmen at piece-work rates. If it were found that he was paying in the aggregate larger sums to his workpeople than he would pay under the recognized terms and conditions, we apprehend that it would be open to the tribunal to find that he was observing terms and conditions not less favourable than those "recognized," even though a few individuals among his workmen might be worse off than they would be under the "recognized terms and conditions." But let it be supposed that, in a given case of this character, the tribunal gave its decision against the employer. It may well be thought an unjust result that the employer in such a case should be liable to an action for "arrears of wages" at the suit of one of the less successful of his workmen. Again, it may happen that an employer, though paying a lower rate of wages than the "recognized terms" provide for, is in a position to argue that in other respects the terms and conditions which he has observed are more favourable to the workmen than the recognized terms and conditions. In a doubtful case the National Arbitration Tribunal may eventually decide that the recognized terms and conditions are on the whole more favourable than those observed by the employer, but in such a case grave injustice might be done if a court were compelled to order, retrospectively, that the employer should pay the difference between the two rates over a long period during which the question had not even been raised.

It was said on the plaintiff's behalf that, if his contention were to be rejected, a workman would have no remedy against a contumacious employer who, without any colour of right, insisted on paying wages at a rate admittedly below the legal minimum. The argument is that no question would then arise under art. 5, para. 3, so that the National Arbitration Tribunal would never have jurisdiction. In our opinion, this contention lacks substance. The hypothetical employer, if he did not even pretend to be observing the law, would be liable to prosecution under reg. 92, and, if he persisted in wrong-doing, he would have to look forward, since he would then be guilty of a continuing offence, either to paying a long series of heavy fines or to almost continuous imprisonment, or to both. The minister may have thought that these penalties would sufficiently deter such a hypothetical (and, we suspect, wholly imaginary) employer of labour from continuing his defiance for any long period. It may be objected, however, that the punishment of the employer will give little satisfaction to the workman, who will naturally desire, not retributive justice for his master, but money for himself. The minister may well have thought, however, that it was unnecessary to make any further provision than he has done for the enforcement of recognized terms and conditions. The workman may himself be rebellious, in the sense that, not being a trade unionist, he has been content to take wages about the sufficiency of which he and his employer were agreed. In such a case it is at least arguable that justice does not demand that he should be given the right for which the plaintiff contends. If, on the other hand, the rights of trade unionists are involved, either directly or indirectly, a trade dispute will almost certainly arise, and the minister has ample power under part I. of the order to see that it is properly disposed of, with the result that art. 2, para. 5, will come into play for the protection of workmen and employers alike. In most cases of the class which we are considering, there will almost certainly be some question at issue which can be referred under art. 5, para. 3, and when the whole structure and tenor of the order are considered it is not, we think, surprising to find that it is left to associations of employers, on the one hand, and of workmen on the other, rather than to individuals, to invoke the intervention of the minister.

We do not think that much help can be obtained by looking

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at other enactments regulating wages, though they may, perhaps, usefully be compared and contrasted with the one now in question. Those to which we were referred are different in material respects from the order which we are considering. The Trade Boards Act, 1909, avoids any agreement for the payment of wages in contravention of the Act. So do the Coal Mines (Minimum Wages) Act, 1912, and the Agricultural Wages (Regulation) Act, 1924. The effect of this avoidance is that the contract must (in Lord Wright's phrase) "be, as it were, "reconstructed by striking out the rate of wages where it is "lower than it ought to be and by inserting the proper rate "of wages in accordance with the statute": see *Gutsell* v. *Reeve* (1). This order is quite differently framed. It does not expressly avoid any contract. It provides for the insertion of an implied term in the contract of employment as does the Coal Mines (Minimum Wage) Act, 1912, but it does so, as we have shown, only sub modo, after the prescribed conditions precedent have been fulfilled. It is further to be remarked that the order contains no provision giving power to justices to order payment of back wages, and has no words such as are found in the Trade Boards Act, 1909, and the Agricultural Wages (Regulation) Act, 1924, saving the workman's right to recover wages by civil proceedings.

For these reasons, we are of opinion that the plaintiff's claim fails, and we do not think it necessary or desirable to express any opinion as to the other difficult questions which were debated before us, since, in our view, they do not now arise.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co. for Burges, Ware & Scammell, Bristol; W. H. Thompson.*

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(1) [1936] 1 K. B. 272, 283.

H. C. G.

Considered. HOWGATE v. BAGNALL [1951] 1 K. B. 265

GREENFIELD *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

C. A.

1944

Oct. 19, 20, 27.

MacKinnon and Lawrence L.JJ., and Cassels J.

Emergency legislation—War injury—Impact on property of bomb dropped from enemy aircraft—Bomb crater on railway track—Subsequent negligent order to engine-driver to proceed—Fall of engine into crater—Death of engine-driver—Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *ss.* 3 *and* 8, *sub-s.* 1.

A bomb, dropped from an enemy aircraft at 9.10 p.m., made a crater on a railway line. At 9.45 p.m. the engine of a train overturned in the crater and the engine driver, who was "proceeding "at caution" on a direct order (admittedly negligent) from his employers, was killed:—

Held, that the injury to the engine-driver was not "caused "by the impact on . . . . property" of an enemy bomb, and, therefore, was not a "war injury" within the meaning of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939.

APPEAL from Charles J. (1)

The plaintiff, the widow of William George Greenfield, sued under the Fatal Accidents Acts, 1846 to 1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, as his administratrix, for damage suffered by reason of his death. Greenfield was an engine-driver in the employment of the defendant railway company. On March 3, 1943, at about 9.10 p.m. a bomb was dropped from an enemy aircraft on the railway track between Shenfield and Ingatestone, Essex (a distance of about three miles), forming a crater. The signalman at the signal box at Shenfield was aware that the track circuit was broken between Shenfield and Ingatestone, and that his telephone communication with Ingatestone was not working. He held up Greenfield, who was driving a train towards Ingatestone, while he communicated these facts by telephone to a superior officer at Stratford and asked what instructions he should give to Greenfield. The signalman was directed to order Greenfield to proceed "at caution" towards Ingatestone and to keep a good look-out, and the signalman transmitted that order. In accordance with the order, Greenfield proceeded with his train, but his engine fell into the crater made by the bomb at 9.45 p.m. and he received injuries from which he died. The defendants, by their defence, pleaded that Greenfield died from "war injuries" within s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions)

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(1) [1944] W. N. 159.

Act, 1939 (1), and that, therefore, by virtue of s. 3, sub-s. 1, of that Act, no damages were payable by the defendants to the plaintiff. At the trial, the defendants admitted negligence in their directing Greenfield to proceed. Charles J. held that the injury which killed Greenfield was a "war injury" within s. 8, sub-s. 1, and gave judgment for the defendants, but he assessed the damages at 2,000*l.* under the Fatal Accidents Acts, 1846 to 1908, and 200*l.* under the Law Reform (Miscellaneous Provisions) Act, 1934, (2). The plaintiff appealed.

Beney K.C. and *Raeburn* for plaintiff. The physical injury to Greenfield was not "caused" by the impact on property of an enemy bomb within the meaning of s. 8, sub-s. 1 (*b*), of the Personal Injuries (Emergency Provisions) Act, 1939. Charles J., was right in saying that what had to be determined was the dominant, effective, or proximate cause of Greenfield's injury. That cause was the defendant's negligent order to Greenfield "to proceed at caution": see the speech of Viscount Simon L.C., in *Yorkshire Dale Steamship Co., Ld.* v. *Ministry of War Transport* (3); and not the crater caused by the bomb which was in situ before the order was given, and Charles J. was wrong in concluding that the proximate cause of the injury was the dropping of the enemy bomb: *Hill* v. *New River Co.* (4). Unless one of the acts specified in the subsection constitutes a proximate cause of the physical injury, there is no "war injury" within s. 8, sub-s. 1, and no defence available to the defendants under s. 3 of the Act. In *Smith* v. *Davey Paxman & Co. (Colchester), Ld.* (5), Scott L.J. said that, for the injury to come within s. 8, sub-s. 1, there must be some definite causal nexus between the enemy act and the final effect of an injury. Throughout the judgments in that case, it is implicit that the proximate cause of the injury, and not the " causa sine qua non," must be sought in determining whether it is a " war injury." In *Adams* v. *Naylor* (1), Scott L.J. said, with reference to ss. 3 and 8, sub-s. 1, of this Act : " On ordinary principles of statute " interpretation the fundamental right of the subject of " coming to the King's courts for redress of wrongs should not " be treated as taken away by Parliament, except by quite clear " language " (2). In *Taylor* v. *Sims and Sims* (3), where the floor of a house, injured by an enemy bomb a month previously, gave way and injured the plaintiff, the injury was held to be a " war injury " within the meaning of the sub-section, but that case is distinguishable, since there was no intervening cause such as a negligent order to traverse the floor. In *Leanse* v. *Egerton* (4) a passer-by, who was injured by falling glass from a house damaged by an air-raid four days earlier, recovered damages from the absent occupier who did not raise the defence that the injury was such a " war injury," yet, if the decision of Charles J. was right, that defence would have been successful. In any case, though the crater was caused by an enemy bomb, Greenfield's injury was not caused in any sense by the " impact " of that bomb on property.

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(1) Personal Injuries (Emergency Provisions) Act, 1939, s. 8, sub-s. 1: "In this Act unless the "context otherwise requires ". . . . 'war injuries' means "physical injuries—(*a*) caused by "—(i.) the discharge of any "missile (including liquids and "gas); or (ii.) the use of any "weapon, explosive or other "noxious thing; or (iii.) the doing "of any other injurious act: "either by the enemy or in com"bating the enemy or in repelling "an imagined attack by the "enemy; or (*b*) caused by the "impact on any person or "property of any enemy aircraft "or any aircraft belonging to, or "held by any person on behalf of "or for the benefit of His Ma"jesty or any allied power, or any "part of, or anything dropped 'from, any such aircraft."

(2) [1944] W. N. 160.

(3) [1942] A. C. 691.

(4) (1868) 9 B. & S. 303.

(5) [1943] 1 All E. R. 286.

Sydney Turner K.C. and *Edgedale* for defendants. A " war " injury " within the meaning of s. 8, sub-s. 1, may be a physical injury caused solely by one of the acts described in the sub-section or by one of those acts combined with some other act, e.g., one involving negligence, nuisance or breach of duty. In either of these cases s. 3 of the Personal Injuries (Emergency Provisions) Act, 1939, applies, and by that section those suffering from " war injuries " are removed from the ambit of the common law and those statutes which normally give redress for injury and the injured person is compensated by the State under the Act of 1939. The sole question before the court is whether Greenfield's injury is a " war injury " within s. 8, sub-s. 1, and it is plain that his injury was " caused " by the impact on property of an enemy bomb. In *Weld-Blundell* v. *Stephens* (5), Lord Sumner said (6) : " What are 'natural, probable and necessary' consequences " . . . . I still venture to think that direct cause is the best

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(1) [1944] K. B. 750.
(2) Ibid. 759.
(3) [1942] W. N. 124.
(4) [1943] K. B. 323.
(5) (1920) A. C. 956.
(6) Ibid. 983.

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"expression . . . . Direct cause excludes what is indirect, "conveys the essential distinction, which causa causans and "causa sine qua non rather cumbrously indicate and is consistent with the possibility of the concurrence of more direct "causes than one, operating at the same time and leading to a "common result." If a physical injury is directly caused by the impact on property of an enemy bomb, s. 3 of the Act applies, notwithstanding that there may have been other direct causes of the injury. This, no doubt, is not so where the cause other than that under s. 8, sub-s. 1, is in the nature of a continuing nuisance as is *Leanse* v. *Egerton* (1), or where the cause other than that under s. 8, sub-s. 1, e.g., an act of negligence, is quite unconnected with the original enemy act as in *Smith* v. *Davey Paxman & Co. (Colchester), Ld.* (2). The present case comes within the terms of s. 3 since the whole of the events were part and parcel of one air-raid incident occurring between 9.10 p.m. and 9.45 p.m. There was a "definite causal nexus" between the enemy act and the final effect of the injury. [*Billings* v. *Read* (3) was cited.]

Beney K.C. replied.

Cur. adv. vult.

Oct. 27. The following written judgments were read.

MACKINNON L.J. The only question in this case is whether the injury which killed Greenfield was a "war "injury" within the meaning of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939. It is contended that the physical injury of Greenfield was caused by the "impact" on property of something dropped from an enemy aircraft within the meaning of para. (*b*) of that subsection. I do not agree with this contention. It is true that the hole into which the engine fell was caused by a bomb from an enemy aeroplane, and that Greenfield's injury was caused by his engine falling into the hole, but I cannot think that his injury was caused by the impact of the bomb on the defendants' railway line. If, while his engine was on its way, a German bomb had fallen on or close to it, and Greenfield had been killed by the explosion, he would clearly have suffered a war injury under para. (*a*) of the sub-section. If, while the engine was proceeding, a German bomb had fallen on a bridge and shattered it, so that parts of the bridge fell on

(1) [1943] K. B. 323.
(2) [1943] 1 All E. R. 286.
(3) (1944) 61 T. L. R. 27.

Greenfield and injured him, then, I think, he would have, under para. (*b*) of the sub-section, suffered an injury "caused "by the impact on . . . . property" of something dropped from an enemy aircraft. In my view, the addition in para. (*b*) of the words "impact on any property" to the words "impact "on any person" is to cover the case of a bomb which does not hit a person, but hits something near him (e.g. a house), which thing, or parts of which thing, in their fall or dissolution injure the person.

We were referred to certain cases in which the difficult provisions of this Act have been considered. I confess that I have not found them of much help in applying the provisions of s. 8, sub-s. 1, to the facts of this case. We were also referred to some of the many cases, such as *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (1), in which the meaning of "cause" has been debated with the addition of various epithets such as proximate, predominant, effective, determinate, etc. Most of those cases arose on the construction of marine insurance policies, and in particular on the f.c.s. clause and the effect of "consequences of hostilities." The only question in the present case is what is the meaning of the apparently simple words "physical injuries *caused* by" certain acts. So far as those cases do assist me, I think they support my conclusion that the injury to Greenfield was not *caused* by the impact on him or on any property of anything dropped from an enemy aircraft. This appeal should be allowed, and judgment entered for the plaintiff for the amounts found by Charles J.

LAWRENCE L.J. The question in this case turns on the construction of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939. It is evident from ss. 3 and 8 that the Act contemplates, among others, injuries which are directly caused both by negligence and by enemy or allied acts of war, but those causes must, as a general rule, be contemporaneous with the injury or they would not be direct: (cf. Lord Sumner in *Weld-Blundell* v. *Stephens* (2)). We have, however, not to consider the subject of legal causes in general, but the particular words of s. 8, sub-s. 1. Those words all relate to acts which are not continuing but immediate—"the "discharge of any missile," "the use of any weapon," "in "combating the enemy or in repelling an imagined attack

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(1) [1942] A. C. 691.

(2) [1920] A. C. 984.

"by the enemy," "the impact . . . . of anything dropped "from any such aircraft." Such acts may be contemporaneous with acts of negligence and, jointly with those acts of negligence, may cause injury, but where, as here, the impact of the bomb, qua impact, is over and done with, the impact cannot truly be said to cause injury. It is the crater, not the impact of the bomb, which directly causes the injury. It may be that the crater will cause an injury years after the impact.

To meet this difficulty the defendants' counsel contended that it was a question of degree, and because the injury was caused at 9.45 p.m., and the bomb was dropped at 9.10 p.m. the same night, the matter should be regarded as one incident and the injury could properly be said to have been caused by the impact. In my view, however, the question is not whether the injury is caused during what may be considered as one incident or one raid, but whether it is caused by impact. Reliance was also placed on the dicta of Scott L.J. in *Smith* v. *Davey Paxman & Co.* (*Colchester*), *Ld.* (1), where he referred to the intention of an enemy who might drop a delayed-action bomb or set a booby trap, but I am unable to agree that the enemy's intention has anything to do with the construction of the words of s. 8, sub-s. 1. The interpretation I put on the words of the sub-section accords with all the authorities except *Taylor* v. *Sims and Sims* (2), and I am unable to agree with the view of the learned judge in that case on this point. In particular, the view of the majority in *Adams* v. *Naylor* (3) supports my view, the words "in combating the enemy or in "repelling an imagined attack by the enemy," being limited to actual fighting. Mr. Edgedale's argument, that the case may be tested by considering the case of an action brought against joint tortfeasors one of whom was a bomb dropper who was not an enemy but an ordinary tortfeasor, in my opinion, ignores the fact that we have to consider, not an ordinary case of a joint tort, but the words of s. 8, sub-s. 1. For these reasons, as well as for the reasons given by my Lord and Cassels J., I agree that the appeal must be allowed.

CASSELS J. I agree that this appeal succeeds. It raises the consideration of the oft-debated question of causation. In *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport*, Lord Wright said that "this choice of the real or efficient

(1) [1943] 1 All E. R. 286.
(2) [1942] W. N. 124.
(3) [1944] K. B. 750.

"cause from out of the whole complex of the facts must be "made by applying common sense standards." (1). Mr. Turner, on behalf of the defendants, invited the court to put the words "direct" or "substantial" before the word "cause" so that the words in s. 8, sub-s. 1, would be "directly caused by," or "substantially caused by." He added that the real question here is: "Was there, or was there not, a direct and "substantial connexion between the enemy act and the "injury?" and he contended that, if there was, the case was within the statute.

All this involves an examination of the very short facts of this case. Was this injury caused by the doing of an injurious act by the enemy or by the impact on any property of anything dropped from enemy aircraft, to pick out the applicable words of s. 8, sub-s. 1? Of course, if there had been no crater, the engine would not have overturned in it, but, if there had been no order to "proceed at caution," the engine would not have overturned in the crater. It was not the act of the enemy by injurious act or impact which caused the engine to fall into the crater. It was the negligent order to proceed, as it happened from safety to danger, which led to that result. Enemy action created the crater. The defendants' negligence resulted in the engine falling into it. Mr. Turner contended that an enemy act has to be regarded as a direct cause except where there is no causal nexus between the enemy act and the injury: or where there is a continuing nuisance which causes the accident: *Leanse* v. *Egerton* (*Lord*) (2); *Smith* v. *Davey Paxman & Co.* (*Colchester*), *Ld.* (3). With respect, I cannot agree that this is exhaustive. Though in the history of the events leading up to the accident there may be an enemy act, some negligence independent of the enemy act may be the effective cause. The facts of one case do not always assist in determining the legal effect of the facts in another case, and I am not sure that illustrations serve a very useful purpose, but, if the negligent driver of a motor car, by high speed and failure to keep a proper look-out, overturns his vehicle into a hole, which he might, by the exercise of reasonable care, have avoided, and this injures his passenger to whom he owes a duty to take care, I should find it difficult to believe that the effective cause of the passenger's injuries was enemy action which had made the hole some time before the accident,

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(1) [1942] A. C. 706.
(2) [1943] K. B. 323.
(3) [1943] 1 All E. R. 286.

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and not the negligent driving. I observe that at one time the defendants were alleging negligence on the part of Greenfield as causing the accident in that he failed to drive at a cautious speed or to keep a proper look-out. If the negligence precedes the enemy action, the latter may well be the effective cause of the injuries, but if the enemy action comes first and the negligence follows, the inquiry into the effective cause of the injuries may have a different result. Each case must depend on its own facts, and, dealing with the facts in this case, ascertaining their legal effect, and applying the test laid down in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (1), I think it is clear that the injury of Greenfield was not a " war injury " within the meaning of s. 8, sub-s. 1, but was an injury of which the predominant cause was the admitted negligence of the defendants' servant in ordering the train to proceed.

Appeal allowed.

Solicitors for plaintiff : *Kenneth Brown, Baker, Baker.*
Solicitors for defendants : *W. H. Hanscombe.*

C. G. M.

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(1) [1942] A. C. 691.

1944
Nov. 7.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

REX *v.* SIR BERTRAND WATSON.

Ex parte BRETHERTON.

Justices—Mandamus to state case—Decision erroneous in point of law—Previous decision of judge of the Chancery Division—Refusal of magistrate to state case—Summary Jurisdiction Act, 1857 (20 & 21 *Vict., c.* 43), *s.* 5—*Administration of Justice (Miscellaneous Provisions) Act,* 1938 (1 & 2 *Geo.* 6, *c.* 63), *s.* 19, *sch.* 2.

A metropolitan magistrate, who had decided a case in accordance with the decision of a judge of the Chancery Division, refused, having regard to a decision of the Court of Appeal, to state a case for the opinion of the High Court, the ground for his refusal being that, so far as he was concerned, the law on the matter was decided, and, therefore, there was no point of law on which he could properly state a case :—

Held, that the magistrate was not thereby excused from stating a case since the decision of a Divisional Court of the King's Bench Division was alone made final and conclusive for courts of summary jurisdiction on a point of law.

MOTION for an order of mandamus.

On February 28, 1944, the informant, John Bretherton, applied to the Chief Metropolitan Magistrate, sitting at Bow Street Police Court, for a summons against the United Kingdom Totalisator Co., Ld., for having on February 26, 1944, conducted through a newspaper called "The Winner" a competition in which prizes were offered for forecasts of the results of future events, namely, football matches which had not then been played, contrary to s. 26, sub-s. 1 (*a*) of the Betting and Lotteries Act, 1934. The summons was heard on March 17 and April 6, 1944, when the magistrate dismissed it. The informant applied to the magistrate to state a case for the opinion of the High Court of Justice on the ground that the decision was erroneous in point of law. The magistrate refused to state a case, the reason for his refusal being as follows: "I was "referred to the decision of Eve J., in *Elderton* v. *United* "*Kingdom Totalisator Co., Ld.* (1) and I was of opinion that "the facts in the case before me could not be materially "distinguished from those in the case before Eve J. I con"sidered, therefore, that I was bound by the decision of "Eve J. I considered also *Reg.* v. *Shiel and Others*, in the "Court of Appeal (2). Being of opinion that I was bound to "follow the decision of Eve J., and having regard to the "decision in *Reg.* v. *Shiel* (2) I was further of opinion that the "law on the matter was already decided so far as I was "concerned, and that, therefore, there was no point of law on "which I could properly state a case." The informant applied for a mandamus to compel the magistrate to state a case for the opinion of the High Court.

Valentine Holmes for the applicant. An order of mandamus ought to be made requiring the magistrate to state a case for the opinion of this court. The magistrate dismissed the summons holding that the decisions of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1), and of the Court of Appeal in *Reg.* v. *Shiel* (2) were binding on him and precluded him from stating a case. The Divisional Court of the King's Bench Division has been made the final court of appeal on questions of law raised in courts of summary jurisdiction, and its jurisdiction cannot be ousted by a friendly action before a judge of the Chancery Division as was the case before Eve J. Moreover, the law applied by Eve J. and by the Court of Appeal

(1) [1935] Ch. 373. (2) (1900) 82 L. T. 587.

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in *Reg.* v. *Shiel* (1) have no application to the present case. The ground of the decision of the Court of Appeal in *Reg.* v. *Shiel* (1) was that as a Divisional Court of the King's Bench Division is the final court of appeal so far as a court of summary jurisdiction is concerned, the decision of a Divisional Court on a point of law is final and binding on a court of summary jurisdiction. The legislature has not made a decision such as that of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2) final and binding on courts of summary jurisdiction even assuming that the facts in the case before Eve J. were the same as those in the present case.

Manningham-Buller (*Beyfus K.C.* with him) for the United Kingdom Totalisator Co. The decision of the magistrate in refusing to state a case for the opinion of this court was correct. The decision of the Court of Appeal in *Reg.* v. *Shiel* (1) proceeded on the ground that the decision of the Queen's Bench Division in *Carritt* v. *Godson* (3) was binding on the magistrate. In the present case there was a decision of the High Court which was binding on the magistrate although it was not a decision of a Divisional Court of the King's Bench Division. In *Reg.* v. *Shiel* (1), A. L. Smith L.J., said: "the "magistrate was not in error. He administered the law as it "existed at the time when he was called upon to administer it, "and he only did that which he was bound to do; he could "not properly do anything but administer the law as it then "stood." Those words apply equally to the present case. The decision of Eve J. was binding on the magistrate and he was bound to follow it, and he would have been wrong if he had not refused to state a case on the ground that there was no point of law on which a case could properly be stated. To succeed, the applicant must show that there was a prima facie point of law to be decided and that he was thereby aggrieved.

Viscount Caldecote C.J. There can be no doubt that the learned magistrate was entitled to hold that the decision of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2) was either binding on him, or, at any rate, was one which he ought to follow. He also relied on the decision of the Court of Appeal in *Reg.* v. *Shiel* (1) as an authority justifying his refusal to state a case.

The headnote in *Reg.* v. *Shiel* (1) is: "A magistrate ought

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(1) 82 L. T. 587.

(2) [1935] Ch. 373.

(3) [1899] 2 Q. B. 193.

" not to be ordered to state a case, upon the ground that his " decision was erroneous in point of law, when he has decided " in accordance with a previous decision of the Queen's Bench " Division upon the same point from which there was no " right of appeal." In my opinion, that headnote correctly reproduces the decision to be found in the judgment of A. L. Smith L.J. The London County Council had taken certain proceedings under the London Building Act, 1894 in *Carritt* v. *Godson* (1) which had been decided adversely to them. Later, the council took the proceedings which were the subject-matter of *Reg.* v. *Shiel* (2). They based the charge in that case on a different section of the London Building Act. In the Court of Appeal A. L. Smith L.J. said (3) that the London County Council, with full knowledge of the law on the point, as decided by the Queen's Bench Division in *Carritt* v. *Godson* (1), and well knowing that the decision of the Queen's Bench Division in that case was binding on the magistrate, had taken proceedings before the magistrate. That was an application the like of which he had never heard before. The final Court of Appeal in a criminal cause or matter had decided the law and the applicants in *Reg.* v. *Shiel* (2) then came and said : " We wish " to question that decision of the final court, so we want you " to order the magistrate to state a case to see whether that " decision was a right one or not." I am not surprised that A. L. Smith L.J. said that that was an application the like of which nobody in court had ever heard before.

Reg. v. *Shiel* (2) seems to me to be quite different from the present case. Here the decision which has been held to be of the same effect as the decision in *Carritt* v. *Godson* (1) was one by a learned judge of great authority in the Chancery Division in a case in which he was not the final court of appeal. If, in the present case, the magistrate states a case, there is, in my opinion, an obvious point of law which is open to the party aggrieved by the magistrate's decision, and that is whether or not the judgment of Eve J. was a right decision in the matter before him, and also, no doubt, whether or not that decision is binding on this court. The party aggrieved by the magistrate's decision asks for an opportunity of bringing that decision before this court, which is the last and final court of appeal in a criminal cause or matter, and I cannot see how it can be said that a judgment of a judge who is not the final

(1) [1899] 2 Q. B. 193.

(2) 82 L. T. 587.

(3) 82 L. T. 588.

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court of appeal is, nevertheless, so final that it cannot even be questioned in this court which is the final court of appeal for these proceedings. On that ground I think that the magistrate was wrong in holding that the application was frivolous.

The order of mandamus should be made directing the learned magistrate to state a case on the point of law on which the decision is alleged to be erroneous.

HUMPHREYS J.: I agree.

BIRKETT J.: I agree. The only thing I would like to add in this matter is this. The applicant was the informant in this case, and after the summons had been taken out and the hearing had taken place, he was aggrieved by the decision. In those circumstances the Summary Jurisdiction Act, 1879, provides, by s. 33, sub-s. 1, that "Any person aggrieved who desires "to question a conviction, order, determination, or other "proceeding of a court of summary jurisdiction, on the "ground that it is erroneous in point of law, or is in excess "of jurisdiction, may apply to the court to state a special "case setting forth the facts of the case and the grounds on "which the proceeding is questioned, and if the court decline to "state the case, may apply to the High Court of Justice for an "order of mandamus requiring the case to be stated." That procedure has been followed by the applicant, and he is met by a two-fold answer. It is said that he is precluded from having a case stated because some years ago there was a decision, not of the King's Bench Division, but of a judge of the High Court, which purports to decide the issue in this case. Furthermore, reliance is placed on *Reg.* v. *Shiel* (1) in the Court of Appeal. I desire to add nothing to what my Lord has said about that authority. It is confined precisely to the decision which is there made and is recorded accurately in the headnote. A. L. Smith L.J., in giving the judgment of the Court of Appeal, said (2): "If the decision in *Carritt* v. *Godson* (3) is to be "challenged by the London County Council, they must not "commence proceedings, at any rate before a magistrate; for "if they do, they will be met by the difficulty with which they "are met in the present case," that difficulty being that there was a decision of the Queen's Bench Division which was decisive on the point. There is no such authority in the present case, and, in my opinion, the applicant was entitled to come and ask for this order of mandamus. I agree, therefore, with the order which my Lord has proposed.

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(1) 82 L. T. 587.

(2) Ibid. 588.

(3) [1899] 2 Q. B. 193.

Order of mandamus to state case.

Solicitors for applicant: *Pritchard, Englefield & Co., for March, Pearson & Green, Manchester.*

Solicitors for respondents: *Ashby, Rogers & Fournier.*

R. F. S.

PORT OF LONDON AUTHORITY *v.* ESSEX RIVERS CATCHMENT BOARD.

C. A.
1944
Oct. 16, 17;
Nov. 3.
Scott and du Parcq L.JJ., Uthwatt J.

Rates—Drainage rates—Annual value of hereditament—Determination annually—Notice of determination—Land Drainage Act, 1930 (20 & 21 *Geo.* 5, *c.* 44), *s.* 29, *sub-s.* 2.

Provision is made by sub-ss. 1, 2 and 3 of s. 24 of the Land Drainage Act, 1930, for the expenses of a drainage board to be met by the levying of drainage rates on the owners and occupiers of hereditaments within the district of the board, the rates being assessed on the basis of annual value and made for a period not exceeding twelve months. Section 29, sub-s. 2, of the Act provides for the determination by the drainage board of the annual value of any land which is not assessed for the purpose of income tax under sch. A. to the Income Tax Act, 1918. In or about 1943 a drainage board, which, in 1939, had made a determination of the annual value of certain hereditaments within its district, refused to comply with a request by the owner of the hereditaments to make a fresh determination of the annual value and to serve notice of its decision on him:—

Held, that, in the absence from the Land Drainage Act, 1930, of any express direction to the board to make a new determination each year of the annual value of every property within its jurisdiction, it ought not to be implied that the board was under such a duty.

Decision of Divisional Court ([1944] K. B. 512) reversed.

APPEAL from Divisional Court (1).

The Port of London Authority were at all material times the owners and occupiers of certain docks, workshops and premises situate at Tilbury Docks, Essex, within the Rainham internal drainage district, administered by the

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(1) [1944] K. B. 512.

Essex Rivers Catchment Board, acting as an internal drainage board, pursuant to the Land Drainage Act, 1930. By s. 24, sub-ss. 1, 2 and 3, of the Act, provision is made for the expenses of a drainage board to be met by drainage rates made by the board on the owners and occupiers of hereditaments in the district of the board. By sub-s. 4: "Every rate made by a drainage board shall be an annual "value rate, that is to say, a rate assessed on the basis of "annual value as regards all hereditaments . . . ." By s. 26, sub-s. 2: ". . . . every drainage rate shall be made in respect "either of a period of twelve months or a period of six months, "as the drainage board may determine . . . ." On March 26, 1943, the drainage board made an owner's drainage rate of tenpence in the pound and an occupier's drainage rate of threepence in the pound for the year beginning April 1, 1943, and assessed those rates on the Port of London Authority. Before making these rates the board did not determine afresh the annual value of the hereditaments in question, but based the rates on an annual value determined by it in October, 1939. Before the making of the rates the Port of London Authority, being of opinion that the annual value of their premises for the purpose of the rates had become less than the annual value determined by the board in October, 1939, requested the board to make a fresh determination for the year beginning April 1, 1943, and to serve notice of their decision on the Authority, pursuant to s. 29, sub-s. 3 of the Land Drainage Act. The drainage board refused the request, made the rates in question, and assessed them on the Authority on the basis of the annual value determined in 1939. On April 21, 1943, the Authority, being aggrieved by the assessment gave notice of appeal against it to Essex quarter sessions and to the drainage board pursuant to s. 30, sub-s. 1, of the Land Drainage Act, 1930, which gives a general right of appeal against a rate to quarter sessions. After the notice of appeal had been given the parties agreed to state a special case, under s. 11 of the Quarter Sessions Act, 1849 (Baines' Act), for the opinion of the High Court: (1.) whether the drainage board were bound in law to make a fresh determination of the annual value of the premises and to serve notice of their decision on the Port of London Authority before making the drainage rates for the year beginning April 1, 1943; (2.) whether the rates were bad in law. The case came before a Divisional Court (Humphreys, Oliver and Stable JJ.), on April 18, 1944, when it was held that the drainage board were required to make a determination of the annual value of hereditaments within their jurisdiction each year, and to serve notice of their decision on the owners and occupiers affected. The drainage board appealed.

Comyns Carr K.C. and *H. B. Williams* for the drainage board. It was clearly the intention of Parliament, when passing the Land Drainage Act, 1930, that its administration should be as inexpensive as possible. To that end the legislature gave the board a discretion as to when they should make a determination of value. If the contention of the port authority is correct and the board is bound to make a fresh valuation whenever a rate is made, the administration of the Act would become unusually onerous. No rating authority is under the burden of making an annual valuation, and, therefore, the presumption is that it cannot have been intended to impose such a burden by the Land Drainage Act, 1930, for the first time, on a body with very limited means. It is said that the result of adopting the board's contention will be to deprive the ratepayer of the right of appeal, under s. 29, sub-s. 2, of the Act, but Parliament trusted drainage boards to act fairly in the exercise of their discretion. Under the Finance Act, 1930, there is no right of appeal against a sch. A. assessment, except at the quinquennial assessment, and the Finance Act, 1940, by s. 25, postpones the quinquennial assessment during the war. Assessment on the basis of "annual value" has no reference to the date when the valuation is to be made. It means the value, not in any particular year, but over a period of years.

Sellers K.C. and *Wishart* for the Port of London Authority. The board is bound under the Act to make a determination of value each year and give notice of its determination to the ratepayers. That would not impose any onerous burden on the board, nor would the determination necessitate a revaluation of annual value. The board asserts that it is under no obligation to make a fresh determination. If that contention is correct the ratepayer is deprived of all right of appeal, and it would be an injustice if a ratepayer were bound to pay a sum demanded as a rate without a right of appeal. The port authority have not had an opportunity of having the proper value for 1943–4 determined by a tribunal. It cannot be true that one determination of value is sufficient for all time. In statutes such as the Rating and Valuation Act, 1925, where it is enacted that valuations shall be made at fixed

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Port of London Authority v. Essex Rivers Catchment Board.

intervals, provision is always made for alterations in value occurring in the intervening periods. No such provision is made in the Land Drainage Act, 1930, and therefore, in the absence of express stipulation in the Act that a valuation is to stand for more than one year, it must be presumed that an annual valuation was intended.

Comyns Carr K.C. replied.

Cur. adv. vult.

Nov. 3, 1944. Scott L.J. read the judgment of the court, in which he stated the facts and continued: The questions put by the case were: (1.) whether the drainage board was bound in law to make a fresh determination of the annual value of the premises in question and to serve notice of its decision on the port authority before making the drainage rates for the year commencing April 1, 1943; (2.) whether the said rates were bad in law. The second part of the first question, viz., as to serving notice, is merely consequential on the first part. If there was a duty to determine, s. 24, sub-s. 3, imposed the duty of notice. The Divisional Court answered the first question in the affirmative, and, therefore, held that the two rates assessed on the Port of London Authority (as both owner and occupier) were bad. Their reason was that, in their opinion, the Act of 1930 imposes on the drainage board, on every occasion when it is about to make a rate, an antecedent duty to make a valuation of all lands not assessed to sch. A., with the consequence, that, unless each such rate is so founded on a fresh determination of annual value, it is a nullity. This interpretation of the Act was founded on the Divisional Court's view that s. 24, sub-s. 4, so provides in express terms. Mr. Comyns Carr, for the drainage board before us, contends that that construction is erroneous, although he frankly concedes that his construction is open to the criticism that the language of the Act is not perfectly free from ambiguity, but he contends that the construction adopted by the Divisional Court cannot be got out of the express words of the sub-section, and, further, that it is contrary to the true interpretation of the Act as a whole. In spite of the unanimous view of the Divisional Court we find ourselves unable to agree with them. These are our reasons.

Section 24, sub-s. 4, says: "Every rate made by a drainage "board shall be an annual value rate, that is to say, a rate "assessed on the basis of annual value of all hereditaments."

Section 29, sub-s. 1, says: "The expression 'annual value' "in relation to any land means the gross annual value of that "land as determined for the purposes of income tax under "sch. A. of the Income Tax Act, 1918, as amended by any "subsequent enactment." Sub-section 2 says, in the case of other land, that "the annual value shall be such value as may "be determined by the drainage board." Section 27 of the Finance Act, 1930, which received the Royal Assent on the same day as the Land Drainage Act, provides that there shall be revaluation of properties under sch. A. only in every fifth year. We do not read the provisions of either of those two sections of the Land Drainage Act, where the legislature explains the words "annual value," as having any bearing on the question of the time when the board are to make their determination. That phrase is there used in the same sense as it is used in sch. A. to the Income Tax Act, or as it is understood in the general law of rating, whether gross or net. In each it is used in what may be called an "income" sense as opposed to a "capital" sense, and its use justifies no implication about the time when the act of ascertaining it is to be performed by the taxing or rating authority. It by no means follows that the drainage authority has no duty in the matter. Indeed, an express duty is imposed by s. 1, sub-s. 3: "Subject to the "provisions of this Act, a drainage board shall exercise a "general supervision over all matters relating to the drainage "of land within its district and shall have such other powers "and perform such other duties as are conferred or imposed on "drainage boards by this Act."

The function of supervision cannot be properly performed without due consideration being given from time to time to the question of the standing assessments. If at any time the board has reason to think there may have been any substantial change of annual value, either generally or in regard to some particular hereditament, it is its duty to give consideration to the matter, and, if satisfied that there has been such a change, then to estimate its extent, and if it finds it to be substantial, it ought then to make a new determination. On the other hand, if, having considered the matter, it does not think the change sufficient to require a new valuation, it is free to leave matters as they are. In this context it is important to bear in mind that a present diminution of profits due to a depression in trade does not necessarily mean that the annual value of the hereditament has fallen for purposes of rating or taxation.

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That principle was the ratio decidendi of the House of Lords in *Consett Iron Co., Ld.* v. *Durham Assessment Committee* (1). Expectation of an improvement of trade in future years may well balance a present diminution of trade and justify a refusal to make a present reduction in the assessment of the annual value. Such a principle is implicitly recognized in the view of Parliament that quinquennial assessments for either sch. A. or rating are fair.

That, in the absence from the Act of any express direction to the drainage board to make a new determination every year of every annual value, it would be wrong to imply it, also follows from another characteristic of these drainage boards, which are all treated alike in the Act. They are mostly small and the rates are mostly small. Annual values do not change rapidly, and to revalue every hereditament not assessed to sch. A. every year, and to send out notices and carry out all the detailed work so involved, would put on each board a burden of staff and expense wholly unreasonable in relation to the small degree of advantage the ratepayers would get, and we cannot think they would say "Thank you" to Parliament for so unnecessarily adding to the expenditure of the board, and, therefore, to the rates to be paid.

It should be emphasized that the special case does not state that the circumstances were such that a case had arisen on the merits for a fresh consideration by the board of the annual value proper to be attributed to the hereditaments of the Port of London Authority, or any other hereditament lying within the board's area the annual value of which was not assessed under sch. A., and there is nothing in the special case to show whether or not the board considered the merits of the request for a re-valuation of Tilbury Docks which was preferred by the Port of London Authority. The only matter before us is, therefore, the abstract question of the construction of the Act. If a ratepayer at any time becomes aggrieved by his existing valuation, it is open to him to lay the facts before the board and ask for their consideration, but the statute confers on a ratepayer no right to demand a determination. If the board does not consider the position in regard to a particular valuation when facts have been or are brought before it, its duty of supervision imports a duty to consider, and, if the duty is not discharged, it is open to the aggrieved ratepayer to ask the King's Bench Division for an order of mandamus requiring the

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(1) [1931] A. C. 396.

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board to consider. No procedure is laid down by the Land Drainage Act, 1930, for that purpose, and the law of ordinary rating for the old poor rate or for local government rates under the Act of 1925 has no application. The first sentence of Ryde on Rating states that position quite clearly.

For the above reasons we think both questions should be answered in the negative, and the appeal allowed, with costs here and below.

Appeal allowed.

Solicitors for the drainage board: *Kennedy, Ponsonby & Co., for W. Hilliard & Ward, Chelmsford.*

Solicitor for the port authority: *H. Le Mesurier.*

A. W. G.

EGERTON AND OTHERS *v.* SHIRLEY.

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1944
Oct. 30 ; *Nov.* 10.

Scott and du Parcq L.JJ., Uthwatt J.

Appeal—Court of Appeal—Final or interlocutory order—Appeal against order giving leave to proceed to judgment under Courts (Emergency Powers) Act, 1943 (6 & 7 *Geo.* 6, *c.* 19)—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1—*R. S. C., Or.* 58, *r.* 15.

An order made by a master under R. S. C., Or. 14, giving leave to the plaintiff to sign judgment against the defendant in an action brought under R. S. C., Or. 3, r. 6, is a final order which "finally "disposes of the rights of the parties." Where, at the same time, the master gives leave to the plaintiff to proceed to execution under the Courts (Emergency Powers) Act, 1943, and a judge affirms that order, it is an interlocutory order within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 15.

APPEAL against order of Cassels J. in chambers.

The plaintiffs, Thomas Henry Frederick Egerton and Charles Vernon Somers Cocks, trustees of the Paddington estate, brought an action against the defendant, Frederick Shirley, to recover possession of land for non-payment of rent, arrears of rent and mesne profits, and damages for breaches of covenants to keep premises in repair. The writ in the action was specially endorsed under R. S. C., Or. 3, r. 6, and the plaintiffs applied for judgment under R. S. C., Or. 14. The application was heard by a master who gave leave to the plaintiffs to sign final judgment for possession of the lands, for arrears of rent and mesne profits and for damages for breach of covenant to be assessed, with costs to be taxed. The plaintiffs also applied to the master for leave to proceed under the Courts (Emergency Powers) Act, 1943, and it was further ordered that they should be at liberty under s. 1 of that Act "to issue execution on, or otherwise proceed to, the enforcement of the judgment against the defendants." The defendant appealed to the judge against the second part only of the master's order. On May 5, 1944, the appeal was heard by Cassels J. in chambers, and he made an order dismissing the appeal. By notice of appeal, dated June 8, 1944, the defendant appealed to the Court of Appeal against the order of Cassels J. Leave to appeal to the Court of Appeal was not applied for either to the judge or the court.

Marcus Grantham for the defendant. The order was a "final" order. The correct test to be adopted to determine whether or not a judgment or order is final is whether the order is such that a decision in favour of either party would determine the main dispute between the parties. If so, it is a final order: see *Standard Discount Co.* v. *La Grange*, per Brett L.J. (1); and *Collins* v. *Paddington Vestry* (2). That test was disapproved by James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (3), but the principle was followed in *Salaman* v. *Warner* (4). [*Shubrook* v. *Tufnell* (5); *Bozson* v. *Altrincham Urban District Council* (6); and *Isaacs & Sons* v. *Salbstein* (7) were also referred to.] Applying that test to an order giving leave, under the Courts (Emergency Powers) Act, to proceed to execution of a judgment the matter in dispute between the parties is whether the plaintiff may or may not exercise certain rights suspended by that Act, and if leave to proceed is granted, the main and, indeed, the only dispute is determined once and for all. Therefore, this order must be final, and it is unnecessary for the defendant to obtain leave to appeal.

Harry Lester for the plaintiffs. The provisions of the Courts (Emergency Powers) Act, 1943, merely worked out the rights of the parties which were determined when the plaintiffs were given leave by the master to sign final judgment, and, therefore, the order appealed from was interlocutory only: *Norton* v. *Norton* (8). The practice of the Bar had always been to treat

(1) (1877) 3 C. P. D. 67.
(2) (1880) 5 Q. B. D. 368.
(3) (1879) 27 W. R. 759, 764.
(4) [1891] 1 Q. B. 734.
(5) (1882) 9 Q. B. D. 621.
(6) [1903] 1 K. B. 547.
(7) [1916] 2 K. B. 139.
(8) (1908) 99 L. T. 709, 710.

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all applications under the Courts (Emergency Powers) Act as interlocutory applications, and such a practice is relevant, in the absence of specific authority to the contrary, in deciding whether a particular application is an interlocutory one or a final one. The application before the court is an application in an interlocutory matter and it should have been made with leave either of the judge or the court. [*Blakey* v. *Latham* (1) was also cited.]

Cur. adv. vult.

Nov. 10, 1944. DU PARCQ L.J. read the following judgment of the court. It was contended on behalf of the plaintiffs that the order appealed from was an interlocutory order, and they, accordingly, objected that the appeal was brought out of time: see R. S. C., Or. 58, r. 15. Further, they contended that, by reason of s. 31, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, no appeal lay against the order without leave. If the order is an interlocutory order within the meaning of the rule and the section, there is no doubt that the plaintiffs objection must prevail.

No definition of the terms "final" and "interlocutory" is contained either in the Rules of the Supreme Court or in the statute. Section 68, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that "Any doubt that "may arise as to what orders or judgments are final, and what "are interlocutory, shall be determined by the Court of "Appeal." It thus became necessary for the court once again to consider the cases dealing with the distinction between "final" and "interlocutory" orders, and we are indebted to both counsel for calling our attention to the relevant authorities.

It is, of course, plain that, if the appeal to this court had been against an order refusing unconditional leave to defend and giving leave to sign judgment, it would have lain without leave, since such an order is not to be deemed to be an interlocutory order: see Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 2. It was contended on behalf of the defendant that the order giving leave to proceed was final, since its effect was finally to deprive him of possession of the lands in question and to render him liable to pay sums of money, and we were invited to follow *Shubrook* v. *Tufnell* (2), and

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(1) (1889) 43 Ch. D. 23.

(2) 9 Q. B. D. 621.

Bozson v. *Altrincham Urban District Council* (1), rather than *Salaman* v. *Warner* (2). The interpretation given to the words "final order" in the last-mentioned case was that an order is final only if it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute. The test which was preferred in *Bozson* v. *Altrincham Urban District Council* was stated by Lord Alverstone C.J. (1), as follows: "Does the "judgment or order, as made, finally dispose of the rights of the "parties? If it does, then I think it ought to be treated as a "final order; but if it does not, it is then, in my opinion, an "interlocutory order." We do not find it necessary to decide between these unfortunately conflicting views. Even if we assume in favour of the appellant's contention the correctness of the test proposed by Lord Alverstone, the question remains whether the present order "finally disposed of "the rights of the parties." This phrase must be read in the light of two decisions to which counsel for the plaintiffs referred us. In those two cases a clear distinction is drawn between the determination of rights and the subsequent working out of those rights. In the first of those cases, *Blakey* v. *Latham* (3) Cotton L.J. said: "Any order, in my "opinion, which does not deal with the final rights of the parties, "but merely directs how the declarations of right already given "in the final judgment are to be worked out is interlocutory ". . . ." In the later case of *Norton* v. *Norton* (4), Cozens-Hardy M.R. referred to this as a satisfactory rule, and was content to follow it. In our opinion, the rights of the parties in this case were finally disposed of when leave to sign judgment was given by the master. All that remained was to set in motion, or to retard, the machinery for enforcing, and, in that sense, "working out" those rights. The order made by Cassels J. merely removed a stay which the statute imposed in the absence of such an order. It no more finally disposed of the rights of the parties than does, for instance, the issue of a writ of possession to a plaintiff whose right to possession has already been determined. On this ground we are satisfied that the order was an interlocutory order within the meaning of the rules. The plaintiffs' objection, therefore, succeeds. The appeal has been brought out of time and without the necessary leave, and it must, accordingly, be dismissed with costs.

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(1) [1903] 1 K. B. 547, 548.
(2) [1891] 1 Q. B. 734.
(3) 43 Ch. D. 23, 25.
(4) 99 L. T. 709.

Appeal dismissed.

Solicitors for defendant: *Ankin, Courts & Co.*
Solicitors for plaintiffs: *Trower, Still & Keeling.*

Reported by H. GREENFIELD, Esq., Barrister-at-Law.

MARCO PRODUCTIONS, LIMITED *v.* PAGOLA AND OTHERS.

1944
Nov. 16, 17, 20.

Hallett J.

Injunction—Personal service—Theatrical performance—Restriction on service for other person—Damage from breach of contract to perform—No damage from breach of restriction.

A written contract, by which the defendants, theatrical performers, undertook to perform for the plaintiffs included an express restriction providing that during the period of the engagement the defendants would not perform for any other person. The defendants, however, threatened to perform for another producer during that period. In an action for a declaration that the defendants were bound to perform for the plaintiffs and an injunction to restrain them from breach of the restriction, the plaintiffs proved that damage might flow from the breach by the defendants of the contract to perform for them, but they failed to prove that any damage might flow from breach of the restriction:—

Held, that the court was not prevented from granting an injunction by the failure to prove such damage.

ACTION tried by Hallett J.

The plaintiffs were producers of theatrical entertainments, and the defendants were dancers and entertainers known as "The Four Pagolas." By a contract in writing, dated November 6, 1942, the defendants agreed to perform as required in "Jack and the Beanstalk," a pantomime at the New Theatre, Northampton, or in any of the plaintiffs' productions beginning on or about December 26, 1942. The defendants duly fulfilled this engagement. It was a term of the contract of November 6, 1942, that the plaintiffs should have a further option on the defendants' services for a period beginning on or about December 26, 1943, on the same terms and conditions as those provided by the contract of November 6, 1942, except

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MARCO PRODUCTIONS, LD. *v.* PAGOLA.

as to salary, the option to be exercised on or before July 31, 1943. The plaintiffs exercised the option, but the defendants being unwilling to play in 1943, it was agreed between the plaintiffs and the defendants in writing that in consideration of the plaintiffs forgoing their right to exercise the option, they should be entitled to exercise the option on the defendants' services for the Christmas season 1944/45 on the terms provided for in the contract of November 6, 1942, such option to be exercised by notice in writing given to the defendants on or before July 31, 1944. The plaintiffs exercised their option on July 20, 1944, and required the defendants to appear in a pantomime at Oxford. By cl. 3 of the contract of November 6, 1942: "The artistes shall not during the "engagement or at any time prior appear in any other enter-"tainment private or public . . . . without the written "consent of the company." In the autumn of 1944, it became apparent that the defendants intended to appear during the Christmas season 1944/1945 in a production other than a production of the plaintiffs, and on October 24, 1944, the plaintiffs brought an action against the defendants claiming (1.) a declaration that the defendants were under an obligation to perform as required in a production of the plaintiffs for the Christmas season 1944/1945; (2.) an injunction to restrain the defendants from performing in any production produced by any other person than the plaintiffs for that season; and (3.) further or other relief.

Beyfus K.C. and *Salkeld-Green* for the defendants. No injunction will lie here. In *Lumley* v. *Wagner* (1) and *Warner Brothers Pictures, Incorp.* v. *Nelson* (2) there was evidence of damage arising from breach of a negative undertaking. If an injunction were granted in a case where there was no damage arising from a breach of a negative undertaking the court would be doing indirectly what it could not do directly, namely, enforcing the affirmative undertaking. An injunction can only be granted to prevent the damage which the plaintiff fears will arise from a breach of the restrictive covenant.

Valentine Holmes for the plaintiffs. The court has a discretion to grant an injunction against breach of the restriction not to perform for another producer if the breach of contract by the defendant to perform for the plaintiff will cause damage. It is immaterial that breach of the restriction by itself will not

(1) (1852) 1 De G. M. & G. 604. (2) [1937] 1 K. B. 209.

cause damage to the plaintiff: *Grimston* v. *Cuningham* (1). The positive and negative undertakings, in effect, constitute one contract. The two undertakings are ancillary to and concurrent with each other. They operate together: see the judgment of Lord St. Leonards in *Lumley* v. *Wagner* (2). [The observations of Lord Cairns L.C. in *Doherty* v. *Allman* (3) cited in *Warner Brothers Pictures, Incorp.* v. *Nelson* (4) were also referred to.] In exercising its discretion, the court can consider the amount of damage which would be caused to the plaintiff should an injunction be refused. If there ever was a case where any remedy other than an injunction would be useless, this is it.

HALLETT J. [after rejecting a number of defences and holding that the words " or at any time prior " could be severed from the words in cl. 3 of the contract of November 6, 1942, and that, with these words so severed, the clause was a valid restriction on the activities of the defendants during the engagement, continued:] That the plaintiffs will suffer damage if the defendants refuse to appear in the Oxford pantomime appears to me to be very probable. I cannot put it higher than that, because it may be that in the few weeks which remain before the pantomime is to begin the plaintiffs will succeed in securing other performers to fill the gap which will be left in the production by the secession of the defendants. The plaintiffs' remuneration depends on a share, as I understand it, of the gross takings of the production, and whether the gross takings of the pantomime will go down seems to be a pure matter of speculation. On the other hand, there is no evidence before me that the plaintiffs will be damaged merely by the defendants performing for this rival producer at Manchester. Nobody can suppose that the audience that would go to the Oxford Theatre to see the defendants would be diverted to Manchester to see them and Mr. Beyfus argues very strongly that that is a reason why the plaintiffs should not obtain the injunction which they claim.

With the assistance of counsel I have been looking at the cases with some care. In *Lumley* v. *Wagner* (2) Miss Wagner was threatening to perform at Covent Garden instead of at His Majesty's Theatre, and one can appreciate that people

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(1) [1894] 1 Q. B. 125.

(2) 1 De G. M. & G. 604, 618.

(3) (1878) 3 App. Cas. 709, 719–20.

(4) [1937] 1 K. B. 214.

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Marco Productions, Ld. v. Pagola.

Hallett J.

who admired her singing might be induced to go to Covent Garden instead of going to His Majesty's. There is no express reference in the judgment to the question whether her performance at Covent Garden would damage the plaintiff, although there is one passage which suggests that the question of damages was in the mind of Lord St. Leonards. In *Warner Brothers Pictures, Incorp.* v. *Nelson* (1), Branson J. referred to damage which the plaintiffs apprehended if the defendant appeared in other films, but it is to be observed that he referred to that merely in connexion with the question of the period during which the injunction should operate and not in connexion with the question whether an injunction should be granted. In *Grimston* v. *Cuningham* (2) there was no evidence that the appearance of the defendant for a rival manager would cause damage to the plaintiffs. On the contrary, having regard to the fact that the plaintiff's company was then performing in America and that the defendant broke his contract by entering into an engagement in England, the possibility of such damage appears to be remote in the extreme.

Mr. Holmes has frankly conceded that the fact that no damage will be caused to the plaintiffs by the performance for the rival producer is a circumstance which I should bear in mind in considering whether, in the exercise of my discretion, I ought to grant the injunction claimed, but, in the result I am not satisfied that before an injunction restraining a breach of the negative undertaking can be granted, it is necessary for the plaintiffs to establish that they may suffer damage as a result merely of a breach of the negative undertaking, In other words, I am not satisfied that the plaintiffs must prove that by performing for the rival producer the defendants may cause more damage to them than by remaining idle.

Declaration made that there was a binding and enforceable contract by the defendants to perform in the plaintiffs' production for the Christmas season 1944/1945, *and injunction granted to restrain the defendants from appearing as from December* 26, 1944, *for a period of four weeks in any production other than that of the plaintiffs.*

Solicitors for plaintiffs: *Lewis Lewis and Gisborne & Co.*
Solicitors for defendants: *Clare and Clare.*

(1) [1937] 1 K. B. 209. (2) [1894] 1 Q. B. 125.

C. G. M.

BRENTNALL & CLELAND, LIMITED *v.* LONDON COUNTY COUNCIL.

1944
Nov. 6.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

Weights and Measures—Coal—Deficiency in weight—Need to prove mens rea—" Deficiency . . . . due to the action of some person " over whom the defendant had no control "—Agent of seller—Weights and Measures Act, 1889 (52 *&* 53 *Vict., c.* 21), *s.* 29—*Sale of Food* (*Weights and Measures*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 12, *sub-s.* 2.

Coal in the course of delivery by agents of the sellers, coal merchants, was of less weight than that represented by the sellers; a quantity of coal had been abstracted by some person unknown after the loading of the delivery cart:—

Held (i.) that on a prosecution of the sellers under s. 29 of the Weights and Measures Act, 1889, proof of mens rea in the sellers was not necessary; and (ii.) that the sellers must be deemed to have control over their agents, and were, therefore, not entitled to the protection afforded by s. 12, sub-s. 2, of the Sale of Food (Weights and Measures) Act, 1926.

Twentyman v. *John Hulbert, Ld.* (1944) 170 L.T. 340; 108 J. P. 168, considered.

CASE stated by London Quarter Sessions.

On February 22, 1944, the present respondents, Brentnall & Cleland, Ld. (" the company ") appealed to London Quarter Sessions from a conviction at Marylebone police court on an information laid against them on behalf of the present appellants, the London County Council, for that a load of coal found in a vehicle carrying coal in course of delivery to a purchaser and weighed by an officer duly appointed by the council for the purpose was of less weight than that represented by the company, the sellers of the coal, contrary to s. 29 of the Weights and Measures Act, 1889.

The company were coal merchants, and at the material time Herbert Clarke, Ld., who were normally in competition with the company were acting as agents for them in accordance with the recommendations of the Ministry of Fuel & Power, but this was voluntary on their part. Carts of coal were loaded from wharves and delivered for the company by Herbert Clarke, Ld., without either supervision or interference by the company. On October 8, 1943, the council's coal officer stopped a cart belonging to Herbert Clarke, Ld. The carman produced a consignment note signed by the company as sellers and containing a representation by them that it related to one ton of anthracite boiler nuts for delivery to a Mrs. Panton at a named address. When weighed, the coal was less by 132 lbs. than the weight represented. Evidence was given that the coal was overweight when it was loaded on to the delivery cart of Herbert Clarke, Ld., and it was not established through whose action the deficiency had occurred. Evidence was also given that in view of the shortage of man-power and petrol, and the necessity for speedy emptying of railway coal trucks and (in the present case) the distance (seven miles) of Mrs. Panton's residence from the nearest of the company's depots, it was not reasonably practicable for the company to supervise the handling, transport or delivery of the coal. It was contended for the company that the deficiency was due to the action of some person over whom they had no control, and that therefore they were entitled to be discharged under s. 12, sub-s. 2, of the Sale of Food (Weights and Measures) Act, 1926; that that question of control was one of fact, and that mens rea, which was a necessary element in the offence charged, had not been established. Quarter sessions held (i.) that mens rea was not a necessary element in the offence, but (ii.) that the company had discharged the burden under s. 12, sub-s. 2, of the Act of 1926. Therefore quarter sessions allowed the appeal, but stated this case.

W. A. L. Raeburn for the council. On the question of control the burden of proof is on the company, and they have not discharged it. It is not suggested that they need identify a person as the culprit, but they must give some evidence that some person was guilty, and that that person was not under their control. The company must be deemed to be responsible for the actions of its own agents whose cart and carmen were delivering their coal. With regard to mens rea, the prohibition in the Act of 1889 is absolute and has no reference to the state of mind of the offender: see *Allen* v. *Whitehead* (1), where the offence was committed by the servant of the person convicted acting without his knowledge and against his instructions. The legislature has made this exception from the principle of the criminal law that mens rea must be proved, because otherwise a wide door would be open for evading the beneficial provisions of certain Acts: per Lord Russell of Killowen C.J., in *Parker* v. *Alder* (2). *Twentyman* v. *John Hulbert, Ld.* (3), a case also under s. 29, seems to be against the council. That

(1) [1930] 1 K. B. 211.

(2) [1899] 1 K. B. 20, 25.

(3) (1944) 170 L. T. 340; 108 J. P. 168.

case followed *Paul* v. *Hargreaves* (1) which was also decided on s. 29, it being held necessary to show mens rea, but there the accused person was the innocent driver of the coal cart who had made no representations as to weight, while here the company had made such representations. Quarter sessions have held that an offence has been committed, but that nobody is guilty. The existence of the defence under s. 12, sub-s. 2, of the Sale of Food (Weights and Measures) Act, 1926, shows that the policy of the law is that the person making the representation is guilty unless he can bring himself within that sub-section.

R. A. Robinson for the company. Section 29 of the Act of 1889 does not prohibit absolutely. The words are not: "No "person shall" sell coal under weight, which would be necessary to create an absolute liability. It was necessary, therefore, to establish mens rea in the company, and no evidence was adduced to show that. The company is entitled to the benefit of s. 12, sub-s. 2, of the Act of 1926. It is obvious that the person who abstracted the coal was not under the company's control. No member of their staff was within miles of this coal cart: indeed, it was that fact that rendered the employment of Herbert Clarke, Ld., desirable. It is not incumbent on the company to establish the guilt of an identified person, and, the effect of their evidence being that somebody interfered with the coal after it had been loaded on to the cart, they established all that they need. The company could not accept responsibility for Herbert Clarke, Ld., who were actually delivering the coal. Control is a question of fact which has been found in the company's favour by quarter sessions. It must be given its popular meaning, namely, physical control. It is said that quarter sessions have found that an offence has been committed, but that nobody is guilty. That, however, was the case in *Roberts* v. *Woodward* (2), another case under s. 29 where A. L. Smith J. impliedly held (3) that s. 29 was not absolute in its terms.

VISCOUNT CALDECOTE C.J. Two questions have been raised in this case. One has regard to the necessity of mens rea in the company if they are to be found guilty of an offence, and the other is whether the company is entitled to the protection afforded by s. 12, sub-s. 2, of the Sale of Food (Weights and Measures) Act, 1926.

(1) [1908] 2 K. B. 289.
(2) (1890) 25 Q. B. D. 412.
(3) Ibid. 416.

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BRENTNALL & CLELAND, LD. *v.* LONDON COUNTY COUNCIL.

Viscount Caldecote C.J.

On the question of mens rea it may be convenient to refer to what has been said by high authority as to the duty of the court in cases such as this. In *Mousell Brothers* v. *London & North Western Railway* (1), Lord Reading C.J. quoted a passage from the judgment of Channell J. in *Pearks, Gunston & Tee* v. *Ward* (2) where he said " there are exceptions to this rule " in the case of quasi-criminal offences, as they may be termed, " that is to say, where certain acts are forbidden by law under " a penalty, possibly even under a personal penalty, such as " imprisonment, at any rate in default of payment of a fine." Towards the end of his judgment Lord Reading says (3): " Prima facie, then, a master is not to be made criminally " responsible for the acts of his servant to which the master is " not a party. But it may be the intention of the legislature, " in order to guard against the happening of the forbidden thing, " to impose a liability upon a principal even though he does not " know of, and is not party to, the forbidden act done by his " servant. Many statutes are passed with this object." That case is often referred to for the purpose of the judgment given by Atkin J. in which he said (4): " I think that the " authorities cited by my Lord make it plain that while prima " facie a principal is not to be made criminally responsible for " the acts of his servants, yet the legislature may prohibit an " act or enforce a duty in such words as to make the prohibition " or the duty absolute; in which case the principal is liable if " the act is in fact done by his servants. To ascertain whether " a particular Act of Parliament has that effect or not regard " must be had to the object of the statute, the words used, " the nature of the duty laid down, the person upon whom it is " imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty " is imposed." Atkin J. quotes a judgment of Bowen L.J. in *Reg.* v. *Tyler* (5). *Mousell Bros.* v. *London & North Western Railway* (1) is, I think, a proper guide to the court in connexion with the question whether or not mens rea is a necessary element in the offence.

Section 29 of the Weights and Measures Act, 1889, first gives power to an inspector of weights and measures to make proper tests of vehicles carrying coal for sale with a view to seeing what the weight of their load is. Then it goes on: " If it appears

(1) [1917] 2 K. B. 836, 843.
(2) [1902] 2 K. B. 1, 11.
(3) [1917] 2 K. B. 844.
(4) Ibid. 845.
(5) [1891] 2 Q. B. 588, 592.

"to a court of summary jurisdiction that any load, sack, "or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing "the coal for sale, or the person in charge of the vehicle, as the "case may be, shall be liable to a fine not exceeding five "pounds." Many cases have been cited in connexion with one point, which does not arise in this case, namely, the question of what must be proved where the person in charge of the vehicle is prosecuted. In *Paul* v. *Hargreaves* (1), Lord Alverstone C.J. said: "In my opinion it would be straining "the meaning of the enactment to hold that an innocent carter, "taking out sacks of coal for delivery in entire ignorance that "the sacks contain less than the weight represented by his "employer, is liable to be convicted and fined. That would "make the mere fact of taking out the coal a criminal offence." In the present case, however, the company, having appointed agents to act for them, must, I think, be deemed to accept responsibility for the acts of their agents and, that being so, it seems to me almost beside the point to inquire whether or not the company had a guilty mind, or, in other words, whether mens rea must be shown. I think that quarter sessions came to a correct decision when they said that, in their opinion, mens rea was not a necessary element in the offence. To constitute an offence under s. 29 it is sufficient if there is a representation as to weight—which is clearly proved in this case—and if the coal which was being carried was deficient in weight. Whether or not the company were aware of the deficiency in weight seems to me to have been an unnecessary matter for consideration. The form of the statute, looked at in the way in which Atkin J. as he then was, thought it ought to be looked at, satisfies me on this point.

The other question is whether the company have been rightly held to have the protection given by s. 12, sub-s. 2, of the Sale of Food (Weights and Measures) Act, 1926 (which by s. 15, sub-s. 1, is to be construed as one with (inter alia) the Weights and Measures Act, 1889). Incidentally the fact that this protection is given seems to confirm the view which I have formed on the mens rea point, but we have to decide whether quarter sessions were correct in finding that the company had established that the deficiency was due to the action of some person over whom they had no control. I do not propose to go at length into the authorities which have been cited on this question. I think it is sufficient to say that the company, having appointed their agents, had somebody who was under their control, namely, their agents. It is not necessary to show that there must be something approaching a physical control, or even a control with reference to the performance of every single act in the course of delivering this coal. The company appointed their agents, and I do not think that quarter sessions ought to have decided that they were entitled to shelter under the provisions of sub-s. 2 of s. 12 of the Act. The form in which quarter sessions have recorded their opinion seems to me to be open to some doubt. They say that the deficiency was due to the action of some person over whom the company had no control, but they do not specify who the person is over whom they found that there was no control. I do not, however, base my judgment on that point. I prefer to say that the agents, Herbert Clarke, Ld., were persons over whom the company had control as being their agents, that while those agents were delivering the coal a deficiency in weight was discovered, the reason for which has not been explained, and that on that ground the company should be held to be liable. I, therefore, think that this appeal from the decision of quarter sessions should succeed on the latter point.

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(1) [1908] 2 K. B. 289, 292.

HUMPHREYS J. I entirely agree with the decision of my Lord, and the reasons given for that decision. I only want to add a word because a decision to which I was a party—*Twentyman* v. *John Hulbert, Ld.* (1)—has been cited on behalf of the company as showing that proof of mens rea is a necessary matter in proving an offence under s. 29 of the Weights and Measures Act, 1889.

The first observation I would like to make is that, in my opinion, these short reports of decisions which have not, like the *Law Reports*, been put before the judge who has given the decision so that he may say whether the report correctly describes what he regards as his judgment, ought to be accepted with a good deal of care. If I am correctly reported in the *Law Times* report as saying that on a charge under this section it is necessary that there should be some evidence to prove that the defendants knew that the representation as to the weight was false, I can only say, first, that that was an obiter dictum, and, secondly, that I think it was wrong. I have no recollection of saying anything of the sort, and I cannot believe that

(1) (1944) 170 L. T. 340; 108 J. P. 168.

I said it for I was speaking of a section the language of which is as plain as plain can be. There has been no argument addressed to the court to suggest that there could be found anything in the terms of that Act to justify the suggestion that no person can be guilty of an offence against s. 29 unless he has what is called mens rea. Having stated that an inspector of weights and measures may stop a vehicle carrying coal for sale or delivery and may test the weight, s. 29 of the Weights and Measures Act, 1889, then provides that, if it appears that any sack so weighed is of less weight than that represented by the seller, the person selling shall be liable to a fine. I cannot imagine that any judge would say that that required that the seller should know that the sack did not, in fact, weigh the amount which it was represented as weighing.

The company, however, claim to have a defence here which they have established. I entirely agree with my Lord that the answer to that is that the company, on whom clearly is the onus of showing that they have that defence, have not proved it. They have not indicated any person as being the person to whose action the deficiency was due, and, therefore, they have necessarily failed to prove that that person was a person who was not under their control. If the argument is, as at times it has appeared to be, that as the employers of the carman who was in charge of the coal were not the company, but were the agents of the company, the company were not responsible for anything done or omitted by their agents, the short answer is that a person is responsible for the actions of his agent within the scope of his authority just as much as he is responsible for the acts of his servant, who, indeed, is merely an agent of a particular sort. I agree that the appeal should be allowed.

BIRKETT J. I agree.

Solicitor for council: *J. R. Howard Roberts.*
Solicitors for company: *Wilfred Firth & Co.*

W. L. L. B.

ATTERTON *v.* BROWNE.

1944
Oct. 31;
Nov. 1.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

Food and drugs—Prosecution of "some other person"—Form of summons —Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83, *sub-s.* 3.

The respondent, a smallholder, was charged on informations preferred by the appellant, a sampling officer of the Yorkshire (North Riding) County Council, with selling to named persons for human consumption milk which contained added water. The respondent had not sold any milk to the persons named, all the milk produced on her holding having been taken by the Milk Marketing Board, which distributed it through a chain of intermediaries to the consumers. The respondent was charged under s. 83, sub-s. 3, of the Food and Drugs Act, 1938, by which, where it appears that an offence which has been committed under the Act by a retailer was due to an act or default of the producer of the food in question, the authority concerned may cause proceedings to be taken against the producer without first taking proceedings against the retailer, and the producer may be convicted of the offence with which the retailer might have been charged. The summonses issued against the respondent, however, contained no reference to s. 83, and the justices dismissed the informations on the ground that the particulars of offence in the summonses were untrue and the summonses, therefore, defective. On appeal by the appellant:—

Held, that the justices were right to dismiss the informations, since the summonses omitted vital particulars and were, therefore, so defective and inaccurate as to be misleading.

CASE stated by Yorkshire (North Riding) justices.

At a court of summary jurisdiction sitting at Scarborough on November 29, 1943, informations were preferred by the appellant, Harold Miles Atterton, a sampling officer of the Yorkshire (North Riding) County Council, against the respondent, Mrs. Mary Emma Browne, of White House, Gristhorpe, charging her with unlawfully selling to Thomas Basil Amos and Mrs. Ada Morris an article of food, to wit, milk, which contained added water, in breach of s. 24, sub-s. 1 (*c*), of the Food and Drugs Act, 1938. The respondent was a smallholder occupying a dairy farm. She had no business relationship with either of the named purchasers, all the milk produced on her farm being taken by the Milk Marketing Board under a contract, and passed to the consumers by the Board through a chain of intermediaries. The proceedings against the respondent were taken by virtue of the provisions of s. 83,

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sub-s. 3, of the Food and Drugs Act, 1938 (1), but the summonses contained no reference to that section, they being in the following form: "Statement of Offence. Breach of "s. 24 (1.) (*c*) of the Food and Drugs Act, 1938. Particulars "of offence. On the 8th day of November, 1943 . . . "unlawfully did sell for human consumption to . . . . an "article of food, to wit, milk, which contained added water." At the hearing before the justices it was contended, inter alia, for the respondent that the particulars of offence given in the summonses were untrue and the summonses were defective. The justices dismissed the informations but stated this case.

Vernon Gattie for the appellant. The justices were wrong to dismiss the informations. The omission of any reference to s. 83 does not make the summonses defective. It might have been better if, not only s. 24, but also s. 83, of the Food and Drugs Act had been mentioned in the summonses, but the summonses were in the form commonly used in such cases. Section 83, sub-s. 3, definitely states that the producer "may "be charged with and, on proof that the contravention was "due to his act or default, be convicted of, the offence" with which the retailer might have been charged. The respondent appeared without protest and raised no objection to the form of the summonses until the close of the case for the prosecution. Section 32, sub-s. 1, of the Criminal Justice Act, 1925 (2), must be read with sub-s. 4 of the same section, which provides

(1) Food and Drugs Act, 1938, s. 83, sub-s. 3: "Where it appears "to the authority concerned that "an offence has been committed in "respect of which proceedings "might be taken under this Act "against some person and the "authority are reasonably satis-"fied that the offence of which "complaint is made was due to an "act or default of some other "person and that the first-men-"tioned person could establish a "defence under sub-s. 1 of this "section, they may cause pro-"ceedings to be taken against that "other person without first "causing proceedings to be taken "against the first-mentioned per-"son. In any such proceedings "the defendant may be charged "with and, on proof that the con-"travention was due to his act or "default, be convicted of, the "offence with which the first-"mentioned person might have "been charged."

(2) Criminal Justice Act, 1925, s. 32, sub-s. 1: "Every informa-"tion, complaint, summons, war-"rant or other document . . . . "shall be sufficient if it contains "a statement of the specific "offence with which the accused "person is charged, together with "such particulars as may be "necessary for giving reasonable "information as to the nature of "the charge."

that an information shall be in proper form if it is in such form as would have been sufficient in law if the Act of 1925 had not been passed. If the justices were of opinion that the summonses were likely to deceive and mislead the respondent they should have followed the procedure laid down in Jervis's Act (Administration of Justice (No. 2) Act, 1848) and adjourned the hearing, leaving it to the person charged to apply for an order for particulars.

Scott Cairns for respondent. The justices came to the correct determination. They found that the facts stated in the summonses were untrue and that, therefore, the summonses were defective and misleading. Section 32, sub-s. 1, of the Criminal Justice Act, 1925, requires that a summons, to be sufficient, shall contain a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge. Sub-section 2 provides that the statement of the offence shall describe the offence in ordinary language and also contain a reference to the section of the statute creating the offence. Here the summons omitted all reference to the relevant s. 83 of the statute, and such particulars as were given were clearly erroneous and misleading. The summonses were, therefore, bad. The justices were entitled to exercise their discretion as to adjourning the case under s. 1 of the Administration of Justice (No. 2) Act, 1848.

VISCOUNT CALDECOTE C.J. (having stated the facts and dealt with minor points, continued): The matter which has been chiefly argued and is not easy to decide, is the second objection raised before the justices, "that the three summonses were defective as no reference was made in any of them to s. 83, sub-s. 3, of the Food and Drugs Act, 1938." On the face of it these summonses were not defective. They made a plain and simple charge against the respondent, namely, that she had sold for human consumption to named persons an article of food, to wit, milk, which contained added water. That seems to be complete and to give all the information that is necessary, but the respondent says that she never did sell milk to those named persons and she alleges that the summonses were defective. Counsel for the appellant has frankly said that it would have been better to mention in the summonses not only s. 24 but also s. 83 of the Act. If that course had been taken, the respondent could not have complained that she was deceived or misled by the summonses. That course, however, was not taken, and we have to consider whether the summonses were defective, and whether, for that reason, the charge was properly dismissed.

There is a little history in the legislation relevant to this matter which ought to be stated. It begins with s. 1 of Jervis's Act (Administration of Justice (No. 2) Act, 1848) which provided that: "No objection shall be taken or allowed "to any information, complaint, or summons, for any alleged "defect therein in substance or in form, or for any variance "between such information, complaint, or summons and the "evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as "herein-after mentioned; but if any such variance shall appear "to the justice or justices present and acting at such hearing "to be such that the party so summoned and appearing has "been thereby deceived or misled, it shall be lawful for such "justice or justices, upon such terms as he or they shall think "fit, to adjourn the hearing of the case to some future day." So the law stood until the passing of the Summary Jurisdiction Act, 1879, which, by s. 39, provided: "The following "enactments shall apply to proceedings before courts of "summary jurisdiction; (that is to say) 1. The description "of any offence in the words of the Act, or any order, byelaw, "regulation, or other document creating the offence, or in "similar words, shall be sufficient in law." The latest of the relevant enactments is the Criminal Justice Act, 1925, which, by s. 32, sub-s. 1, provides that in criminal proceedings before justices: "Every information, complaint, summons, warrant "or other document . . . . shall be sufficient if it contains "a statement of the specific offence with which the accused "person is charged, together with such particulars as may be "necessary for giving reasonable information as to the nature "of the charge." Sub-section 4 of that section, however, provides: "Any information, complaint, summons, warrant "or other document to which this section applies which is in "such form as would have been sufficient in law if this Act had "not passed shall notwithstanding anything in this section "continue to be sufficient in law."

The submission made on behalf of the appellant is that, although it might have been more satisfactory that the summonses should contain a reference to s. 83 of the Food and Drugs Act, the omission of that reference does not make the summonses defective, and that the provisions of sub-s. 1 of s. 32 of the Act of 1925 are directed to form and must be read in the light of the provisions of sub-s. 4, which makes an information a proper one if it is "in such form as would have "been sufficient in law if this Act had not passed." Then the argument goes back to the provisions of s. 1 of Jervis's Act.

So far as these provisions are concerned I take the view that the power of the justices to adjourn the hearing of a case to some future day, if objection is taken to the form of the summons, is not a relief which makes the form of the summons satisfactory. It still remains a summons whereby a party has been deceived or misled. In view of the provisions of s. 32 of the Criminal Justice Act, 1925, which really re-enacts the provisions of s. 39 of the Summary Jurisdiction Act, 1879, I think that the summonses in this case were defective by reason of the omission from them of any reference to s. 83. It appears to me beyond dispute that, if the procedure had been followed which is provided for by sub-s. 1 of s. 83, the informations should have contained a reference to that section. Sub-section 2 seems to be a provision for taking what I may call a short cut. Instead of the somewhat elaborate procedure of having the vendor originally charged before the court and then the issue of another information bringing another party before the court as the person responsible for the alleged contravention, the legislature has said: "You, the prosecutor, may, "if you like, go directly against the person really responsible." I cannot see why, if that second course is taken, it should not be incumbent on the prosecution to state in the summons the material legislation which constitutes the offence charged. I think, therefore, that these informations and summonses, worded as they are, might well have deceived and misled the respondent. It seems to me plain that the justices were of that opinion because they accepted the submission that these informations were defective for the reason I have mentioned, and on that ground, they dismissed the summonses.

Although the justices thought it was a proper case in which not to adjourn the proceedings or make an order for particulars, and thought it right to dismiss the summonses as not making plain what the real charge was, we are asked to-day to hold that they were wrong and that they should, notwithstanding the defect in the form of the summons, have held that the matter was in order. That would not be a satisfactory result. This procedure under s. 83, undoubtedly has the advantage of convenience. It gets at the right person, but at the same time, if the powers given by s. 83 are exercised, they should be exercised in such a way as to leave no doubt in the mind of the person charged that it is the exercise of those powers which is being made by the prosecution. The appeal should be dismissed.

HUMPHREYS J.: I am of the same opinion, and I would only add a few words, because, like my Lord, I have felt some difficulty about this case. It seems to me that the justices dismissed these informations on the ground that the summonses were defective in two matters, (1.) in that no reference was made in them to s. 83 of the Food and Drugs Act, 1938, and (2.) because the particulars of offence were untrue.

The courts have always shown themselves very loth to interfere in any case where justices, who have had the case before them, have dismissed the charge on any ground going to the root of the matter. These objections to the present summonses do go to the root of the matter, although, in my view, this case is very near the line. Section 1 of the Summary Jurisdiction Act, 1848, which may be said to have created courts of summary jurisdiction as we know them, clearly indicates that technical objections to informations are not to prevail, even though they touch the substance of the charge. There have been, however, many decisions under that section which show that the section does not operate to prevent an objection being effective where the error alleged is fundamental, such as, for instance, where one offence is charged in the information and a different offence is found in the conviction recorded by the justices, even though the two matters may seem to be very much the same thing. The next section which deals with this matter is s. 39 of the Summary Jurisdiction Act, 1879, under the terms of which *Smith* v. *Moody* (1) was decided. I do not think that *Smith* v. *Moody* (1) assists in this case because it was decided on the terms of a conviction and the courts have always been more particular about the necessity for accuracy, and more rigid in their decisions, with regard to convictions, than they have been with regard to processes of the court, whether informations or summonses issued as the result of information, which are designed to bring persons before the court. Section 39 of the Act of 1879 provides as follows: "The description of any offence in the "words of the Act creating the offence or similar words shall

(1) [1903] 1 K. B. 56.

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"be sufficient in law," and it was held in *Smith* v. *Moody* (1) that that provision did not do away with the necessity for a statement in a conviction of such acts as are a necessary ingredient of the offence in question. Section 39 was repealed by s. 32 of the Criminal Justice Act, 1925, which deals with a number of different documents—informations, complaints, summonses, warrants, or other documents "issued or made "for the purpose of or in connexion with any proceedings "before . . . . a court of summary jurisdiction"—and by sub-s. 2 it requires: "The statement of the offence shall "describe the offence shortly in ordinary language . . . . "and, if the offence charged is one created by statute, shall "contain a reference to the section of the statute creating the "offence." In my opinion, the absence of any statement in regard to the offence created by the statute would be fatal if it were not for sub-s. 4 of s. 32, which provides: "Any "information, complaint, summons, warrant or other document to which this section applies which is in such form as "would have been sufficient in law if this Act had not passed "shall notwithstanding anything in this section continue "to be sufficient in law." I think, therefore, that inasmuch as there was no necessity before 1925 to mention in an information the name of the statute or particulars of the statute creating the offence, it could not be said that any such objection would be fatal, but I do think it is undoubtedly true that the summons in this case does offend against the requirements of s. 32 as it does not comply with these requirements, and I think that omission, although not fatal in itself, does very much strengthen the objection which is made, because the insertion of the reference to the section of the Act creating the offence is intended to act as a pointer to the accused person or his adviser, and in most cases will lead that person to see and understand exactly what it is that is charged against him. A reference to s. 83, sub-s. 3, of the Food and Drugs Act, 1938, in my opinion, would have been desirable in such a form as to make it clear to the person who is charged that the real charge against him is that it was due to the act or default of himself that somebody else sold milk which contained added water. That is the real test, and it would enable that person to prepare his defence to the charge. I think it may be that the mere recital of, or the mere reference to, s. 83, sub-s. 3, of the Food and Drugs Act, 1938, might have been sufficient to cure the objection in this

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case, but I prefer not to express any decided opinion one way or the other about that matter, since, as I have already observed, I think it would have been very much more satisfactory that in plain English the information or summons—and in this case I think the terms are correlative—should state what is the essence of the offence, i.e., that it was by the act or default of the person charged that milk was sold which contained added water on such and such a date to the person named. I am clearly of opinion that on the wording of the charge as we find it in this case it was so defective and so inaccurate as to be positively misleading. That was apparently the view taken by the justices who have stated this case, and I should certainly not be prepared to hold that they were wrong in dismissing the informations upon that ground.

BIRKETT J.: I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. G. Thornley, Northallerton.*

Solicitors for respondent: *Herbert Smith & Co., for Pearsons & Ward, Malton.*

A. W. G.

WATFORD CORPORATION *v.* LONDON PASSENGER TRANSPORT BOARD AND ANOTHER.

1944
June 27.

Wrottesley J.

Local Government—Street—Private street works—Making up—Expense —Apportionment on railway company—Land used as part of line—Failure of company to make objection within due time —Liability—Private Street Works Act, 1892 (55 & 56 *Vict., c.* 57), *s.* 7 (*f*), *s.* 22.

The plaintiff corporation carried out certain street works under the Private Street Works Act, 1892, and made a provisional apportionment of part of the cost on the defendants, who were owners of a railway, in respect of land on which one of the made-up streets abutted. At the time of the laying-out of the street the land in question was used by the defendants solely as part of their line of railway and had no connexion with the street which had been repaired, with the result that, by virtue of s. 22 of the Private Street Works Act, 1892, the defendants were deemed not to be the owners thereof for the purposes of the Act. The defendants

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made no objection to the proposed apportionment within one month as permitted by s. 7 of the Act:—

Held, that, in view of the provisions of s. 22, an apportionment which treated the defendants as though they were the owners of the land was incorrect "in respect of some matter of fact" within the meaning of s. 7 (*f*), and entitled the defendants to object to the proposals made; and that, as the defendants had failed to give notice of objection within the prescribed period, they were bound by the terms of the apportionment.

ACTION tried by Wrottesley J.

On September 4, 1934, the plaintiffs, who were the urban authority for the purposes of the Private Street Works Act, 1892, for the borough of Watford, resolved to execute certain private street works in connexion with a number of streets in the borough, including one known as Gade Avenue. Specifications and provisional apportionments were prepared, and were approved by the plaintiffs, in accordance with s. 6, sub-s. 3, of the Act. The resolution approving them was first published on October 14, 1934, and on October 15, 1934, a copy of the provisional apportionment was served on the defendants, the London Passenger Transport Board and the London & North Eastern Railway Company, who were the joint owners of a parcel of land comprising a railway embankment which fronted, adjoined, or abutted on Gade Avenue, but had no direct communication therewith. In the provisional apportionment the land owned by the defendants was shown as liable to be charged in respect of a frontage of 556 feet 6 inches to the street. No objections to the proposals contained in the resolution passed by the plaintiffs were received from the defendants within the period of one month from the date of the first publication thereof prescribed by s. 6, sub-s. 3 (1), as permitted by s. 7 of the Private Street Works Act, 1892 (1). The works

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(1) Private Street Works Act, 1892, s. 6, sub-s. 3: "The resolution approving the specifications, "plans and sections (if any), "estimates, and provisional apportionments, shall be published in "the manner prescribed in Part II "of the schedule to this Act, and "copies thereof shall be served "on the owners of the premises "shown as liable to be charged in "the provisional apportionment "within seven days after the "date of the first publication. "During one month from the date "of the first publication the "approved specifications, plans, "and sections (if any), estimates, "and provisional apportionments ". . . . shall be kept deposited at "the urban authority offices, and "shall be open to inspection at all "reasonable times."

By s. 7: "During the said "month any owner of any "premises shown in a provisional resolved on were executed by the plaintiffs, and on April 30, 1937, the borough surveyor made a final apportionment of the cost, apportioning 516*l*. 0*s*. 10*d*. to the parcel of land owned by the defendants. On June 2, 1937, notice of the final apportionment was served on the defendants who made no objection thereto. The defendants having failed to pay the sum demanded, the plaintiffs brought the present action to recover 516*l*. 0*s*. 10*d*., with interest at four per cent. from June 2, 1937. By their defence, the defendants pleaded, inter alia, that the parcel of land in respect of which the apportionment on them was made, was, at the time of the laying-out of Gade Avenue, used by them solely as a part of their railway line, or, alternatively, as a part of their works; that it had no direct communication with Gade Avenue; and that, consequently, by virtue of s. 22 of the Private Street Works Act, 1892, they were deemed not to be the owners or occupiers of the land, with the result that no part of the expenses charged in the provisional or final apportionment was recoverable from them.

Serjeant Sullivan K.C. and *Simes* for the plaintiffs. On the facts, at the time of the laying-out of Gade Avenue the defendants were not using the land in question solely as part of their railway line or works and, accordingly, they do not come within the protection afforded by s. 22. If the contrary is held, the defendants are none the less liable to pay the amount of the apportionment on them since they failed to give notice of objection within one month of the date of the first publication of the resolution confirming the provisional apportionment, and are, therefore, barred by the terms of s. 8, sub-s. 2, from raising any objection to the provisional apportionment " in

" apportionment as liable to be " charged with any part of the " expenses of executing the works " may, by written notice served on " the urban authority, object to " the proposals of the urban authority on any of the following " grounds; (that is to say) . . . . " (*e*) That any premises ought to " be excluded from or inserted in " the provisional apportionment; " (*f*) That the provisional apportionment is incorrect in respect " of some matter of fact to be " specified in the objection . . . ."

Section 22: " No railway or " canal company shall be deemed " to be an owner or occupier for " the purposes of this Act in " respect of any land of such " company upon which any street " shall wholly or partially front " or abut, and which shall at the " time of the laying out of such " street be used by such company " solely as a part of their line of " railway, canal, or siding, station, " towing path, or works, and shall " have no direct communication " with such street; . . . ."

" any court proceeding or manner whatsoever." They had a good ground of objection under s. 7 (*f*) which gives as a ground " that the provisional apportionment is incorrect in " respect of some matter of fact to be specified in the objection." If the defendants, by virtue of the application of s. 22 were rightly deemed not to be the owners or occupiers of the land in question, an apportionment which treated them as the owners for the purposes of the Act, was " incorrect in respect of some " matter of fact " and, therefore, a proper subject of objection. Authority in support of this proposition is to be found in the decision of Bray J. in *Wallasey U.D.C.* v. *Walker & Co.* (1), followed by Sargant J. in *Porthcawl U.D.C.* v. *Brogden* (2).

Harold B. Williams for the defendants. It is clear on the facts that at the time of the laying-out of the street the defendants were using the land solely as part of their line of railway. That being so, they were entitled to the protection afforded by s. 22 of the Act under which they are to be deemed not to be " an owner or occupier." The question for decision is whether the defendants must claim the protection given them by s. 22, by way of objection under s. 7. The only grounds of objection mentioned in that section which could possibly apply are (*e*) that the premises ought to be excluded from the provisional apportionment, and (*f*) that the provisional apportionment is incorrect in respect of some matter of fact. Paragraph (*e*) is clearly inapplicable because the premises must appear in the apportionment so that the costs attributable to them, which have to be paid by the other frontagers, or, if the railway company subsequently makes a communication with the street, by the company, may be ascertained. Paragraph (*f*) is a general provision and does not apply here because there is no fact in respect of which the appointment is incorrect. It is unnecessary for a railway company which relies on s. 22 to give notice of objection under s. 7, and, indeed, it is not entitled to do so.

June 27. WROTTESLEY J. read the following judgment. In this case the plaintiffs, the mayor, aldermen and burgesses of the borough of Watford, claim under the provisions of the Private Street Works Act, 1892, the sum of 516*l.* 0*s.* 10*d.*, being the final apportionment of the cost of certain private street works in a street in the borough of Watford, namely, that part of Gade Avenue which is bounded for 556½ feet by the railway

(1) (1906) 70 J. P. 199.

(2) [1917] 1 Ch. 534.

embankment of the defendants, the London Passenger Transport Board and the London & North Eastern Railway Company. That the plaintiffs did all that was necessary to enable them to claim from the various frontagers on that avenue the proportionate part of the cost of the works is admitted, and that the amount claimed, subject to what has to be said hereinafter, is the right amount is also admitted. It is also admitted that, if the defendant companies had, like ordinary frontagers, to give notice of objection, the notice they gave was out of time. It follows, therefore, that the provisional apportionment became the basis of the final apportionment, and only two questions arise which could form a shield of defence to the defendant companies.

The first question is whether under s. 22 of the Private Street Works Act (which I will hereinafter refer to as the Act) the railway company are excused from liability to pay their share of these costs on the ground that the land in respect of which the claim is made is land of the railway company which was at the time of the laying-out of Gade Avenue used by them solely as a part of their line of railway or works and had no direct communication with Gade Avenue. It is common ground that, in fact, this land had no direct communication with Gade Avenue.

In order, therefore, to answer the first point I have to decide whether, when Gade Avenue was laid out, the land on the other side of the fence was being used by the railway companies solely as a line of railway or works. The second point arises out of what I have already indicated, namely, that the defendants did not serve, within the time laid down by the Act, a written notice objecting to the proposals of the urban authority. The plaintiffs say that, even if the defendants' land here falls within the description above referred to in s. 22 of the Act, the time to take that objection was when the resolution of the plaintiffs was served on the companies, and that, unless the objection was put forward under s. 7 of the Act, that is to say, within one month of the first publication of the approved specification and so forth, the defendants are not protected by the provisions of s. 22. [Wrottesley J. reviewed the evidence dealing with the user of the land by the defendants, and continued :] I have no doubt, therefore, that the defendants were using the land on their side of the fence solely as a part of their line of railway or works, some time before the avenue was laid out. It is not necessary for this purpose that the railway should be

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opened to the public. The defendants, therefore, were protected by s. 22 of the Act, provided they have taken the proper steps to invoke that protection.

On this part of the case, if the defendants are in the right, they were not merely not bound, but they were also not entitled to object under s. 7, and the justices under s. 8 had no power even to consider any objection they might make. The defendants agree that this follows from their contentions. This question is not an easy one to determine, and it involves a careful consideration of the Act.

The origin of this Act is similar to that of many of the provisions of the Public Health Acts. It began as a private Act obtained by various municipal authorities. Then it was enacted as a general adoptive Act, but, whereas the private Acts had contained a provision referring disputes to arbitration, the public Act substituted the provisions of s. 8, making a court of summary jurisdiction the authority for hearing and deciding objections, and denying to the High Court any jurisdiction to deal with " objections under the Act." If, therefore, the protection afforded to the defendants by s. 22 constituted something which could have been put forward as an objection under the Act, the defendants failed to take the necessary steps in time, and this court cannot help them in view of the plain words of s. 8, sub-s. 2, which provides : " No objection which " could be made under this Act shall be otherwise made or " allowed in any court proceeding or manner whatsoever." It is true that s. 22 nowhere says that a railway company to whom that section applies shall have a ground of objection. The court must, therefore, look at the Act as a whole, and at s. 7 in particular, to see whether a railway company, relying on s. 22, is under obligation to raise the matter under s. 7.

Among the grounds set out precisely as grounds of objection in that section, only two are suggested by the plaintiffs as applicable, viz., (*e*) and (*f*). Of these (*e*) is clearly inapplicable, because it is implied in s. 22 that the railway premises falling within the section are not to be excluded from, but are to be inserted in, the provisional apportionment. The premises must be included so that the cost apportioned to them may be spread over the other frontages.

That leaves, however, the far more general words of para. (*f*), namely, " that the provisional apportionment is incorrect in " respect of some matter of fact to be specified in the objection." I am aware that there are matters other than those arising under s. 22 to which these words are apt, but, nevertheless, they seem to me to be apt also to a case covered by s. 22. I take the words of s. 22 to mean that a railway company to which the section applies, even though it be, in fact, the owner of premises, fronting, abutting or adjoining a street, is to be deemed not to be the owner of such premises. If that be so, an apportionment which not merely includes the premises, but also treats them as though the railway company did own such premises is incorrect, judged by the Act. What the apportionment ought to do is to state the cost of the works relative to this frontage, and then to distribute this sum pro rata over the other premises, and so against the owners of those other premises. In failing to do this, the apportionment of the cost relative to the premises of the railway company against the railway company without more ado is incorrect in respect of something which is made a matter of fact by the Act and can be objected to on that score by the railway company before the court of summary jurisdiction.

There is no direct authority on this point. It is true that *Rex* v. *Jones, Ex parte Mein* (1) is a case where a railway company took objection before justices and failed, and on appeal to a Divisional Court the justices were upheld, but the point was not taken. I am, however, fortified in the view I have taken by a decision of Sargant J. in *Porthcawl U.D.C.* v. *Brogden* (2), following a decision of Bray J. in *Wallasey U.D.C.* v. *W. H. Walker & Co.* (3). In the former case arguments very similar to those used in the present case were put forward, but the judge said: "I think that to adopt such a construction " would be to read the scheme of the Act too narrowly. In my " judgment, the scheme of the Act was to have an apportion-" ment of the liability of particular named persons published " and ascertained by the local authority, and that from that " time forward—or rather from the time when the opportunity " under the Act of objecting to that apportionment had passed " by—the apportionment should be conclusive, so that all " persons concerned should know what their position was. " To my mind, it is an essential part of that construction not " only that the apportioned amount should be ascertained, but " that the persons liable for that amount should be ascer-" tained." Later, he goes on: " I should have come to that " conclusion on this legislation if there had been no authority

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(1) (1907) 71 J. P. 326.
(2) [1917] 1 Ch. 534, 539.
(3) (1906) 70 J. P. 199.

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" in respect of it, but the point seems to have been decided by " Bray J. in *Wallasey U.D.C.* v. *W. H. Walker & Co.*" (1).

It would, undoubtedly, have made the Act clearer if it had been provided in s. 22 that the facts there set out would constitute a good objection to apportionment as against the railway company, or if, among the grounds set out in s. 7, there had been a reference to the matters enacted in s. 22, but, since there is nothing in s. 22 to which effect cannot be given in the way I have indicated on the provisional apportionment, I think that the general line of reasoning used by Sargant J. must prevail. The general objects of the Act are best achieved if all objections of whatever nature are disposed of within the period, and by the procedure laid down as the only method in s. 8, sub-s. 2. In the result, therefore, there must be judgment for the plaintiffs for the amount claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Theodore Goddard & Co., for W. G. L. Davies, Watford.*

Solicitor for defendants: *A. Herbert Grainger.*

(1) (1906) 70 J. P. 199.

P. B. D.

C. C. A.

1944 *Nov.* 27, 28.

Viscount Caldecote C.J., Singleton and Birkett JJ.

REX *v.* LEON.

Criminal law—Obtaining credit by fraud—Incurring gaming debt—Debtors Act, 1869 (32 & 33 *Vict., c.* 62), *s.* 13, *sub-s.* 1—*Winning valuable thing* " *in wagering* "—*Gaming Act,* 1845 (8 & 9 *Vict., c.* 109), *ss.* 17, 18.

Section 13 of the Debtors Act, 1869, which enacts that: " Any " person shall . . . . be deemed guilty of a misdemeanour: " (1.) if in incurring any debt or liability he has obtained credit " under false pretences, or by means of any other fraud . . . . " does not apply to debts or liabilities incurred in wagering which, by s. 18 of the Gaming Act, 1845, are declared to be null and void.

To establish the offence of winning a valuable thing by fraud " in " wagering " under s. 17 of the Gaming Act, 1845, fraud in the actual wagering must be proved. Where a jury are satisfied on the evidence that a party to a wagering transaction has acted fraudulently throughout, they are justified in convicting.

APPEAL against conviction and sentence.

On October 25, 1944, the appellant, Salomon Leon, was charged at the Central Criminal Court, before Oliver J. and a jury, on two counts of an indictment with obtaining credit by fraud, contrary to s. 13 of the Debtors Act, 1869 (1) and on three counts with winning by fraud in wagering a sum of money or valuable thing contrary to s. 17 of the Gaming Act, 1845 (2). On three other counts he was charged with obtaining money by false pretences.

On May 25, 1944, at an interview between the appellant and one Jack Wilson, a bookmaker, it was arranged that Wilson would accept the bets of the appellant on horse races up to a limit of 500*l.* a week, settlements to be made each week. At that interview Wilson, according to his evidence, asked the appellant: "Are you sure you can meet that obligation?" The answer of the appellant was: "Perfectly." In the weeks ending June 3, 10 and 17, the appellant won sums of 140*l.*, 100*l.* and 225*l.* respectively, and was duly paid by Wilson by cheques. In the two following weeks the appellant lost 147*l.* 19*s.* 1*d.* and 305*l.* He did not pay either of those sums. At the trial evidence was given to show that the appellant was not in a position to meet a loss of 500*l.* a week, that at all material times his banking account was considerably overdrawn, and that many of his cheques had been returned. Evidence was also given by three other bookmakers with whom the appellant was having betting transactions at about the same time that either the appellant had failed to pay his losses or his cheques had been returned by the bank. By direction of Oliver J. the appellant was acquitted of obtaining money by false pretences, but the jury returned verdicts of Guilty on the other five counts of the indictment, and the appellant was sentenced to nine months' imprisonment on each count, the terms to run concurrently. The appellant appealed.

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(1) Debtors Act, 1869, s. 13: "Any person shall in each of the "cases following be deemed guilty "of a misdemeanor . . . (1.) If "in incurring any debt or liability "he has obtained credit under "false pretences, or by means of "any other fraud."

(2) Gaming Act, 1845, s. 17: "And be it enacted, that every "person who shall, by any fraud "or unlawful device or ill practice "in playing at or with cards . . . . "or other game, or in bearing a "part in the stakes, wagers, or "adventures, or in betting on the "sides or hands of them that do "play, or in wagering on the event "of any game, sport, pastime, or "exercise, win from any other "person to himself, or any other "or others, any sum of money or "valuable thing, shall be deemed "guilty of obtaining such money "or valuable thing from such "other person by a false pretence, "with intent to cheat or defraud "such person of the same . . . ."

By s. 18: "And be it enacted "that all contracts or agreements, "whether by parole or in writing, "by way of gaming or wagering, "shall be null and void; and "that no suit shall be brought or "maintained in any Court of Law "or Equity for recovering any sum "of money or valuable thing "alleged to be won upon any "wager . . . ."

S. Lincoln for the appellant. The fraud alleged against the appellant was his previous intention to take the winnings on any bet which he won, but not to pay any bet which he lost. Section 18 of the Gaming Act, 1845, which was not referred to at the trial, enacts that "all contracts or agreements whether "by parole or in writing by way of gaming or wagering" shall be null and void. This was a betting transaction and the law will not assist anyone to enforce it, and no legal rights or obligations are thereby created. In *Luckett* v. *Wood* (1) it was held, not only that a betting transaction was absolutely void under the Gaming Acts, but also that, even if the parties had not pleaded the Gaming Acts, it was the duty of the court to refuse to give any effect to the contract. The same principle was applied in *Morgan* v. *Ashcroft* (2). Cockburn C.J. said in *Rawley* v. *Rawley* (3) that "the right of set-off depends ". . . . upon there being an actionable debt" In the same way "debt or liability" in s. 13 of the Debtors Act, 1869, must mean an actionable debt or liability, and, therefore, a betting transaction cannot come within that section. In *Haigh* v. *Sheffield Town Council* (4) Lush J. said that the Gaming Act, 1945, "left an ordinary bet a mere debt of honour, depriving "it of all legal obligation, but not making it illegal." The direction of Oliver J. that, until he repudiated it, a man who lost money to a bookmaker had incurred a debt within the meaning of s. 13 of the Debtors Act, 1869, was wrong. So also was the direction that, if a man enters into a betting transaction with the intention of taking his winnings but not of paying if he loses, or knowing that he cannot pay if he loses, he is guilty of fraud within s. 17 of the Gaming Act, 1845. Fraud in wagering is doing something in the course of the wagering which the man is not entitled to do, and not merely taking advantage of a position which the law allows. A person who refuses to pay after the game is over is not committing fraud in wagering within the meaning of s. 17. In *Rex* v. *Governor of Brixton Prison. Ex parte Sjoland and Metzler* (1) Lord Alverstone C.J. said: that "fraudulent conduct whereby "the prosecutor is induced to play and which is preliminary "to the playing itself is not sufficient to constitute an offence "under the statute. The section in plain terms says that "there is to be some fraud or unlawful device or ill practice "'in playing' at cards." [*Rex* v. *Moore* (2); and *Maccord* v. *Osborne* (3) were also referred to.]

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(1) (1908) 24 T. L. R. 617.
(2) [1938] 1 K. B. 49.
(3) (1876) 1 Q. B. D. 460, 463.
(4) (1874) L. R. 10 Q. B. 102, 109.

Slade K.C. and *L. A. Byrne* for respondent. The words of s. 13, sub-s. 1, of the Debtors Act, 1869: "If in incurring "any debt or liability" do not mean merely a debt or liability which is actionable or recoverable at law. "Debt" covers also what is known as a debt of honour, which can be recovered unless the Gaming Act is pleaded. Although not recoverable in law it is nevertheless a debt and there was abundant evidence on which the jury could find that the appellant had incurred a debt or liability with no intention of meeting it. Either the appellant from the beginning never intended to pay his losses although he had the money to do so, or else, having no funds with which to pay, he obtained credit. In either case it was fraud. In s. 17 of the Gaming Act, 1845, the material words are "by any fraud . . . . in wagering." A distinction has to be drawn between fraud or cheating in such things as card games and fraud in wagering on the event of horse races. Wagering is instantaneous. It is merely a matter of offer and acceptance, and it is difficult to see what is fraud in wagering if it is not fraud to deceive the person who accepts the bet when the wager is made. Fraud in wagering must either be something occurring before the wager is made, or words used in the actual wagering, which induce the other party to accept the bet. The jury found that at the time of wagering and throughout the transaction the appellant had no intention of paying if he lost. That was fraud in wagering and the appeal should be dismissed.

Singleton J., in delivering the judgment of the court, stated the facts and continued: The case for the prosecution was that the appellant was fraudulent throughout, that he never intended to pay if he lost, but was bent on obtaining

(1) [1912] 3 K. B. 568, 570.
(2) (1914) 10 Cr. App. R. 54, 56.
(3) (1876) 1 C. P. D. 568, 571.

money—in other words, that he was determined to cheat the bookmaker by pretending to be betting on the ordinary terms, thus representing himself as willing to meet his obligations, whereas he never intended to do so. Obviously, this is a matter which it is not easy to prove, but the jury were satisfied on the evidence of the bookmaker, of the appellant's bank manager, and of other bookmakers, and also after hearing the evidence given on behalf of the appellant, that the appellant was fraudulent throughout his dealings with the bookmaker. The issue was put clearly by Oliver J. in this way: "The "question you must pose to yourselves right through this "matter is this. From the moment this man went to Wilson, "from the moment he left him, did he intend to cheat, to see "what he could get out of him, and if he lost not to pay?" The jury's verdict, after that direction, was arrived at on its being proved to their satisfaction that the appellant was acting fraudulently throughout. There was evidence on which they could so find, and this court is not further concerned with that part of the case. It was somewhat faintly suggested by Mr. Lincoln that there was misdirection by the learned judge in that he did not sufficiently put or stress the appellant's case. There is no substance in that submission.

The matters to which our attention has been chiefly directed are difficult questions of law, and it remains to consider the submissions which have been made. It was argued by Mr. Lincoln that no offence had been committed under s. 13 of the Debtors Act, 1869, because the section must be taken to refer only to an actionable debt or a debt enforceable in law. The material part of the section is: "Any person shall in "each of the cases following be deemed guilty of a mis- "demeanour (1.) if in incurring any debt or liability he has "obtained credit under false pretences, or by means of any "other fraud." Counts 4 and 5 of the indictment were under that section. In count 4 the charge was "that the appellant "on June 24 in incurring a debt or liability to Jack Wilson "obtained credit to the amount of 147*l*. 19*s*. 1*d*. from the said "Jack Wilson by means of fraud." The fifth count is in similar terms, in relation to the sum of 305*l*. Mr. Lincoln, in support of his argument, referred us to several authorities. First, he referred to *Rawley* v. *Rawley* (1) and, in particular, to the words of Cockburn C.J.: "The right of set-off depends, "I think, upon there being an actionable debt. The statute,

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(1) 1 Q. B. D. 460, 463.

"no doubt, speaks of 'debt,' but that, unless a very narrow "construction be adopted, means actionable debt." Mr. Slade referred to the judgments in the Court of Appeal in that case, and, particularly, to a passage in the judgment of the Master of the Rolls (1) where he said: "And it has always "been accordingly held, that a set off can only be successfully "pleaded when an action could have been maintained for the "same debt"; to the words of Kelly C.B. (2): "But are "these mutual debts here, when one of them is a debt for which "an action cannot be brought?" and to the words of Mellish L.J. (2): "The judicial construction of this section has been "that no debts can be used by way of set-off except such as "are recoverable by action." Mr. Slade's object in citing those passages to us was to make his point that there are two kinds of debts, actionable debts or debts enforceable in law, and other debts, such as debts of honour. We were also referred to *Luckett* v. *Wood* (3) and *Haigh* v. *Sheffield Town Council* (4) and, further, to the words of s. 18 of the Gaming Act, 1845. It was pointed out to us by Mr. Lincoln that the learned judge, in his direction to the jury, appeared to treat gaming debts as voidable, whereas by s. 18 they were declared to be null and void. It does not appear to us that the authorities which were cited are of great help on this part of the case, but it is right to say that there is some authority for saying that the word "debt" in a statute means an actionable debt, and a fortiori it would appear to be so in a penal section such as s. 13 of the Debtors Act, 1869.

We think, however, that more help is to be obtained by an examination of the Act itself. The Debtors Act, 1869, is entitled: "An Act for the abolition of imprisonment for "debt, for the punishment of fraudulent debtors, and for "other purposes." Part I deals with the abolition of imprisonment for debt, and Part II, which includes s. 13, deals with the punishment of fraudulent debtors, and is mostly concerned with bankruptcy offences. It is not necessary to consider Part III. It is difficult to think that betting transactions were contemplated by the legislature as being within the framework of the Act. One cannot envisage imprisonment for a gambling debt or bankruptcy arising directly from such a debt, for the legislature twenty-four years earlier had said in s. 18 of the Gaming Act, 1845, that any such contract was

(1) 1 Q. B. D. p. 466.
(2) Ibid. p. 467, 468.
(3) 24 T. L. R. 617.
(4) L. R. 10 Q. B. 102.

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null and void. It is to be remembered that no credit was given when the present arrangement was made. It was no more than an agreement to accept bets, if made, up to a certain limit. Again, no credit was given when a bet was placed and accepted. It was only when the fancied horse lost that a debt so-called arose and the credit was given. In our view, losses so incurred are not debts within the meaning of s. 13 of the Debtors Act, 1869, and we have come to this conclusion on an examination of the Act itself, and of its scope. Oliver J.'s direction on this matter was in these terms: "Well, of "course, it"—that is a betting debt—"is not enforceable in "law, but as a matter of law I direct you that a man who "loses money to a bookmaker by making a losing bet does "incur a debt, even although it is not enforceable." A little later he says: "But I tell you that up to the time that he "repudiates he has incurred a debt." Unfortunately, the learned judge's attention was not drawn to the wording of s. 18 of the Gaming Act, 1845. We think the direction was not an accurate statement of this somewhat difficult branch of the law, on which there does not appear to be any direct authority. Consequently, the convictions on counts 4 and 5 of the indictment must be quashed. It is perhaps not inappropriate to remark that the magistrate before whom the case came did not commit on those charges, being of opinion, apparently, that there was no case on which he ought to commit.

I now turn to the charges under s. 17 of the Gaming Act, 1845. Leaving out some of the words of that section one reaches this: "Every person who shall, by any fraud in "wagering on the event of any sport, win from any other "person a sum of money, shall be deemed guilty of obtaining "such money or valuable thing from such other person by "a false pretence." It is to be observed that something more than what is commonly known as obtaining money by false pretences is contemplated by the legislature. Counts 6, 7 and 8 of the indictment, are framed in the statement of offence as "obtaining a valuable thing by false pretences, contrary "to s. 17 of the Gaming Act, 1845," and then in the particulars it said that the appellant on such and such a day, "by fraud in wagering on the events of horse races, won from "Jack Wilson a valuable thing, to wit, a cheque for" a specified sum.

Mr. Lincoln submitted to this court that it was necessary to show "fraud in wagering." That is right, but the difficulty is to see what "in wagering" means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were satisfied that the appellant was fraudulent throughout. Mr. Lincoln cited to us authorities under this section which dealt with games of cards. They were *Rex* v. *Governor of Brixton Prison* (1), and *Rex* v. *Moore* (2). In those cases it was said that in a game of cards or a game such as the three-card trick, it was not sufficient to show that there was fraud before the game started. There must be shown fraud in the course of the game itself. Of course, a game of cards is not the same thing as wagering. The act of making a wager is done by a word or a few words—an offer and an acceptance. Mr. Slade, on behalf of the Crown, submitted that, unless, in the circumstances of this case, the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous. He submitted that the circumstances of this case showed that there was evidence on which it was open to the jury to find fraud in wagering.

Reference has already been made to the direction of the learned judge on the case generally, and it is right to point out again that in the course of his summing-up Oliver J., dealing with the Act of 1845, said: "Now the other three "charges are for a different matter. They are framed under "a very old statute, some 100 years old, the Gaming Act "of 1845, and that deals with conduct which is described as "'obtaining money by fraud in wagering.' It is rather "quaint language—'fraud in wagering,'—but that undoubtedly, "I tell you as a matter of law, would include obtaining money "by fraud in backing horses. Again you have to answer the "question, and I think it is exactly the same question. The "facts of these cases are not quite the same as the last two, "because they are earlier in date and I will point out the "dates to you. On his three weeks of betting with Wilson he "won, the first week 140*l.* (count 6), the second week 100*l.* "(count 7), the third week 225*l.* (count 8). Do you regard "that as money that he had won by cheating in the circum-"stances of this case, and before you came to that conclusion, "it seems to me you would have to come to the conclusion that "you are satisfied upon the evidence, and upon the facts, that "when he entered into those three sets of transactions he

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(1) [1912] 3 K. B. 568.

(2) (1914) 10 Cr. App. R. 54.

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" never intended to pay if he lost ; that he intended to put the " money in his pocket if he won, but he never intended to pay " if he lost ?"

The real question put to the jury was : " was the appellant " fraudulent throughout ? " and they said : " Yes, he was." That seems to us necessarily to mean that at the time when the appellant made each of these bets with the bookmaker he intended to cheat and defraud him. In those circumstances it seems to us that there was, as Oliver J. held, evidence on which the jury could come to the conclusion that this offence was proved, and they so found. It follows that the appeal against conviction on counts 6, 7 and 8 fails. At the same time we think it right to point out that there was evidence in this case which satisfied the jury that the appellant was fraudulent throughout. That set of circumstances can seldom recur by way of proof. The result of the appellant's appeal is that he succeeds on one part of the case and fails on the other. The sentence which was passed on him was one of nine months' imprisonment. As this court has found some part of the case against him not proved, we think it right that there should be some alteration in his sentence, and accordingly it is reduced from nine months to three months' imprisonment.

Appeal allowed in part and sentence reduced.

Solicitor for appellant : *Burnett L. Elman.*
Solicitor for Crown : *Samuel Coleman.*

A. W. G.

Followed. BANKS *v.* COPE BROWN. [1948] 2 K. B. 287

Applied. TURNER *v.* BAKER. [1949] 1 All E.R. 560.

Followed. LLEWELLYN *v.* HINSON. 1948] 2 K. B. 385

Distinguished. BAKER *v.* TURNER [1950] A. C. 401

Applied. BANKS *v.* COPE-BROWN. [1948] 2 All E.R. 76.

Applied. LLEWELLYN *v.* HINSON. [1948] 2 All E.R. 95.

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Distinguished. BAKER *v.* TURNER. [1950] 1 All E.R. 834.

Followed. HAYWARD *v.* MARSHALL [1952] 1 Q.B. 89

Followed. HAYWARD *v.* MARSHALL [1952] 2 Q.B. 89

Landlord and tenant—Rent restriction—" Part of a house let as a separate " dwelling "—Sole use by tenant of two rooms—Joint use with landlord of other rooms—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.

By an oral agreement a tenant was let two unfurnished rooms in a seven-roomed house, together with the use jointly with the landlord of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory ;—

Held, that there was really a sharing of the house, each party having the exclusive use of some rooms and the two parties together having the use in common of other rooms, and was, therefore, not a letting of the two rooms as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

APPEAL from Southampton county court.

By an oral agreement the landlord, Mrs. Del Soto, sub-let to the tenant, Leslie Neale, two unfurnished rooms in a house containing seven rooms of which she was the lessee. The agreement provided for the use by the tenant, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house, and conservatory. The standard rent of the house was 30*s.* a week. On July 11, 1944, the tenant applied under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Act, 1920, to the judge of the Southampton county court by summons, for an apportionment of the standard rent as at August 7, 1943. The county court judge dismissed the application, holding that a letting of two unfurnished rooms in a house, together with the use, jointly with the landlord, of the kitchen, bathroom, lavatory, garage and other rooms, was not a letting of part of a house as a separate dwelling within s. 12, sub-s. 2, of the Act of 1920 (1). The tenant appealed.

S. Pocock (*Done* with him) for the tenant. The tenant is tenant of "a part of a house let as a separate dwelling," within the meaning of s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and, he is, therefore, entitled to an apportionment of the standard rent of the house under sub-s. 3 of that section. The county court judge would appear to have found that there were two lettings (1.) a sole letting of the two rooms, and (2.) a joint letting of the use of other rooms in common with the landlord, but the true view is that there was a letting of the two rooms with merely a licence to the tenant to use the amenities of the house in common with the landlord. If the learned judge is right and the use of amenities in common with the landlord takes the letting of part of a house out of the benefit of apportionment, the possibility of evasion of the Rent Restriction Acts will be enormously increased. [*Smith* v. *Prime* (1), and *Hornsby* v. *Maynard* (2) were referred to.]

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2: "This Act "shall apply to a house or a part "of a house let as a separate dwell-"ing."

Sub-section 3 provides for the apportionment of the standard rent of the whole house.

By sub-s. 8: "Any rooms in a "dwelling-house subject to a "separate letting wholly or partly "as a dwelling shall, for the pur-"poses of this Act, be treated as a "part of a dwelling-house let as a "separate dwelling."

B. J. MacKenna for the landlord. If the tenant's contention is correct equal inconveniences will result. If an attic is separately let, together with the joint use of every other room in the house, tenancy of the attic, according to the tenant, becomes protected under the Rent Restriction Acts, and the landlord and his successors may have to share the whole house with the tenant of the attic, and possibly his heirs, almost in perpetuity. The county court judge came to a right conclusion in holding that this was not the letting of a separate dwelling within s. 12, sub-s. 2, of the Act of 1920.

SCOTT L.J. Morton L.J. will first deliver his judgment.

MORTON L.J. stated the facts, read s. 12 of the Act of 1920, and continued: The county court judge found as follows: "I find as a fact from the evidence, as also appeared in the "rent book before it was altered, that what was let was two "unfurnished rooms for the sole use and occupation by the "tenant, and the garage, kitchen, bathroom, lavatory, coal-"house and conservatory for use and occupation by him "jointly with the landlord." Again, in another portion of his judgment, he described the case as follows: "When, as in "this case, a person has got in a lease at a rent two rooms "and the use in common with the owner of other rooms, "such as the kitchen, that is a sole tenancy of two rooms and "a joint tenancy, as it were, of the other rooms, since he has "a right to use them in every way, not merely as an accessory "to something else." It was contended by counsel for the plaintiff, relying on that latter passage, that the county court judge had taken the view that there were, in fact, here two lettings. I do not so read his judgment. There was only one letting, and the county court judge recognized that fact. The use of the phrase "as it were" indicates that he was not speaking of a separate joint tenancy in the full sense of those words.

Two cases were referred to in argument. *Smith* v. *Prime* (1) I do not find of any assistance for the present purpose, being a decision on different words in a different section of the Act. In *Hornsby* v. *Maynard* (1) the facts were so different from those of the present case that again I find the decision of no assistance.

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(1) [1923] W. N. 131.

(2) [1925] 1 K. B. 514.

Were the two rooms in question in the present case a part of a house let as a separate dwelling? In my view, they were not. What was let was the two rooms together with the use, in common with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house and conservatory, and it would be a misuse of language, to my mind, to say that the two rooms, and nothing more, were let as a separate dwelling. The real substance of the matter was that there was a sharing of the house. Each party had the exclusive use of some rooms and the two parties together had the use in common of other rooms.

Strange results might follow if we were to find that a letting such as this was a letting of the two rooms as a separate dwelling. If, for instance, the owner of a house let to a tenant an attic-bedroom with the right to use all the other rooms in the house, jointly with the landlord, it might be said that that was a letting within the Act, that there could be apportionment of rent under s. 12, sub-s. 3, of the Act as between the attic-bedroom on the one hand and the rest of the house on the other hand, and that a statutory tenancy would arise of the attic-bedroom carrying with it the right to use all the other rooms in the house.

We were referred by Mr. MacKenna to the Representation of the People Act, 1867, and to the Parliamentary and Municipal Registration Act, 1878, but I think it would be dangerous to draw any conclusion from any definitions which one finds in these Acts. It was suggested in the course of the argument for the tenant that, if the county court judge's decision is upheld, the result might follow that a letting of two rooms, together with the use, in common with the landlord, of, for instance, a W.C., would be outside the Act. I am content to leave that matter to be dealt with if, and when, it arises, but it may be—I express no view on the matter—that this question is one of degree and, as the judge below observed in his judgment, in the present case a very substantial part of the dwelling was shared, including such a very important room as the kitchen.

For these reasons I am satisfied, on the facts of this case,

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(1) [1925] 1 K. B. 514.

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that the county court judge's decision was right, and this appeal ought to be dismissed.

SCOTT L.J. I agree.

FINLAY L.J. I also agree.

Appeal dismissed.

Solicitors for tenant: *Lovell, Son & Pitfield, for Paris, Smith & Randall, Southampton.*

Solicitors for landlord: *Sharpe, Pritchard & Co., for Bell, Pope, Bridgwater & Hughes, Southampton.*

A. W. G.

Followed. LEWISHAM BORO' *v.* ROBERTS.
[1949] 2 K. B. 608

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JAMES MACARA, LIMITED *v.* BARCLAY.

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Oct. 25, 26, 27, 30;
Nov. 17.

Scott and du Parcq L.JJ., Uthwatt J.

Emergency legislation—Requisition—Land—Contract for sale of land—Requisition before date of completion—Notice served on vendor in occupation—No actual possession by requisitioning authority—Ability of vendor to give vacant possession—Defence (General) Regulations, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 51.

Pursuant to an agreement for the sale of a house and lands with vacant possession, the purchasers paid a deposit of ten per cent. of the purchase price. Before the date fixed for completion the competent authority, acting under powers conferred by reg. 51 of the Defence (General) Regulations, 1939 (1), gave notice to the vendor, who was in occupation, that the lands and premises were required for national purposes, but the authority never actually entered on the land. The vendor informed the purchasers of the notice, but proceeded to negotiate, without the knowledge of the purchasers, with the requisitioning authority with a view to inducing the authority not to proceed with the requisition, pleading personal hardship and stating that he required the property for his personal occupation. On the date fixed for completion of the sale, the purchasers informed the vendor that, as the vendor was unable to give vacant possession, they required the return of the deposit paid.

(1) By Defence (General) Regulations, 1939, reg. 51: "(1.) A "competent authority, if it appears to that authority to be "necessary or expedient so to do "in the interests of the public "safety, the defence of the realm "or the efficient prosecution of the "war, or for maintaining supplies "and services essential to the life "of the community, may take "possession of any land, and may "give such directions as appear to "the competent authority to be "necessary or expedient in "connexion with the taking of "possession of that land."

The vendor refused to comply with that demand, and the purchasers sued for the amount of the deposit :—

Held, that service of the notice of requisition on the vendor without actual possession being taken by the requisitioning authority created an immediate interest in possession in that authority and was an effective exercise of the power conferred on the authority by reg. 51 of the Defence (General) Regulations, 1939, and, with the consequence, that the vendor was not, at the date fixed for completion of the contract, able to give vacant possession to the purchasers who were, therefore, entitled to be repaid the amount of the deposit.

Held, further, that, in the circumstances, the jurisdiction of the court under s. 49, sub-s. 2, of the Law of Property Act, 1925, could not be invoked to negative the legal right of the purchasers.

APPEAL from decision of Vaisey J., sitting as additional judge of the King's Bench Division.

By an agreement, dated April 16, 1943, the plaintiffs, James Macara, Ld., agreed to buy, and the defendant J. D. Barclay, agreed to sell for the sum of 15,500*l*. certain property at Shillingford consisting of a parcel of land comprising eleven acres together with a house known as Ferry House, and other lands held therewith comprising some thirty-eight acres. Under the agreement a deposit of 10 per cent. of the purchase price was paid by the purchasers to the vendor's agent. The conditions of sale provided that completion was to take place on or before June 24, 1943, and that vacant possession of the property was to be given on completion. An abstract of title was delivered and the title was accepted, and, by May 5, 1943, the form of the conveyance had been agreed. On June 10, 1943, the competent authority for the purpose of the Defence (General) Regulations, 1939, served on the vendor, who was in occupation of the property, a notice under reg. 55. The form of the notice was as follows : " Emergency Powers (Defence) Act, " 1939—Defence (General) Regulations, 1939. Dear Sir— " *The whole of Ferry House, Shillingford, and part of the* " *surrounding grounds and outbuildings to be indicated later.* " I have to inform you that the department have come to the " conclusion that it is essential, in the national interest, to " take possession of the above premises occupied by you. " I must therefore ask you to take this letter as formal notice " that the Commissioners of Works are taking possession of the " premises, and you are directed to arrange for the removal of " such chattels as are not requisitioned as soon as the commissioners have indicated the chattels which are requisitioned.

" An inventory of the requisitioned chattels will be drawn up. " If you desire to remove any of the contents of the premises " immediately, you should communicate with this department. " They regret any inconvenience that this may cause you and " ask for your co-operation." With the notice there was sent a form of claim for compensation which (inter alia) required the claimant to fill in the date when possession was taken by the competent authority. On the back of the notice information was given as to various matters, and instructions were given relating to the proper method of filling in the form of claim and the address to which communications " with regard " to the requisition " might be sent. The form also bore a statement to the effect that the department would be prepared to consider the payment of an advance on account of compensation pending determination of its amount. The addressee of the notice was asked to sign an acknowledgment of its receipt, but, in fact, the vendor did not formally acknowledge the receipt. The notice was accompanied by a covering letter addressed to the vendor which stated that the vendor had promised to accept the requisition notice as owner of the property, and that, in deference to the vendor's wishes, a copy was not being sent to the purchasers' solicitors in view of the fact that the vendor accepted the responsibility. The vendor informed the purchasers of the receipt of the notice, but, thereafter, in the correspondence which passed between him and the requisitioning authority, the purchasers were ignored by the vendor. An interview took place between the vendor and an official of the requisitioning authority, and, on June 17, the vendor's agent wrote to the authority pointing out that the vendor " will suffer unduly in regard to the requisition " within a few days of completion." The vendor wrote on June 18 stating, inaccurately, that he wanted Ferry House for " personal occupation." The notice, however, was not withdrawn. On June 21, the purchasers' solicitors wrote to the vendor's solicitors and also to the vendor direct stating that, as the vendor would be unable to give vacant possession of the property, they rescinded the contract and desired the deposit to be returned. On June 24, the vendor's solicitors wrote to the purchasers expressing the view that the vendor could give vacant possession and stating that their client intended to forfeit the deposit and treat the contract at an end by reason of the purchaser's repudiation of their obligations. No actual entry was ever made on the land by the requisitioning authority, and the land was de-requisitioned some three months later. In an action by the purchasers claiming the return of the deposit, Vaisey J., in the exercise of his discretion under s. 49, sub-s. 2, of the Law of Property Act, 1925, ordered the vendor to repay that sum. The vendor appealed.

Pascoe Hayward for the vendor. The notice of June 10, 1943, given to the vendor by the competent authority did not make it impossible for the vendor to give the purchasers vacant possession of the property on completion. At all material times the vendor was able to give vacant possession. The power to enter into possession conferred on the competent authority by reg. 51 means "entering into possession," and it is not effectively exercised unless and until there has been actual entry. It cannot be exercised merely by notice given to the person in occupation. The purchasers, therefore, had no right to rescind the contract. Regulation 51, in its natural meaning, empowered the authority to do one thing and one thing only, namely, to take physical possession of the land, which was the only way the purpose of the notice could be served. The notice itself amounted to nothing in law and could not define the law, and, on its true construction it did not amount to notice that the power given to the competent authorities by the regulations was thereby being exercised. The terms of the notice were, in form, much the same as those in question in *In re Winslow Hall Estates Co.* and *United Glass Bottle Manufacturers, Ld.'s Contract* (1), and in the words of Bennett J. (2) "the notice is merely a polite intimation "on the part of the government that they propose to act." *Cook* v. *Taylor* (3) is not in point because there the competent authority had entered on the premises in question. Simonds J. said (4) ". . . . from the moment when the requisitioning "authority served the notice and took the keys from the "vendor, the vendor was not in a position to give vacant "possession . . . ." The contrast between "taking posses-"sion" under reg. 51 and "requisitioning" under reg. 53 is to be noted. In the latter event, notice given with regard to specified things vests them in the competent authority. The effect of the contract was to constitute the vendor trustee for the purchasers: see *Shaw* v. *Foster* (5); *Lysaght* v.

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(1) [1941] Ch. 503.
(2) Ibid. 507.
(3) [1942] Ch. 349.
(4) Ibid. 352.
(5) (1872) L. R. 5 H. L. 321, 338.

Edwards (1). In any case, the time of completion was not of the essence of the contract, and before repudiation the purchasers should have made it so by giving notice to complete within a fixed reasonable time: Williams on Vendor and Purchaser (4th ed.) vol. 2, p. 991. [*Stickney* v. *Keeble* (2); *In re Scott and Alvarez's Contract* (3); *Beyfus* v. *Lodge* (4) were also referred to.]

Devlin for the purchasers. As reg. 51 does not particularize any particular way of taking possession the competent authority can do so by giving notice. Taking possession must be construed not in a technical, but in a popular, sense as the general public would understand it, and no one would think that the person on whom the notice was served could do what he liked with the land which was the subject of the notice. Had the notice been served personally instead of by post, that would have satisfied the vendor's idea of "taking possession." In the circumstances possession both in fact and in law passed when the notice was served. It was not necessary that the requisitioning authority should enter into possession before liability for compensation began to accure. Vacant possession in the case of freehold land means vacant possession in law and in fact, and the vendor was not in a position to give vacant possession to the purchasers on the date provided for by the conditions of sale. The vendor was not entitled, as of right, to a reasonable time after June 24 in which to complete. The contract meant what it said, namely, that completion should take place on that date. There was evidence in the court below on which Vaisey J. came to the conclusion that time was of the essence of the contract. [du Parcq L.J. referred to *Patrick* v. *Milner* (5) where it was held that time was not of the essence of the contract.] If a vendor puts it out of his power to complete a contract he is not entitled to ask for reasonable time to get the power back: *Stickney* v. *Keeble* (2). So, also, where a vendor is not able to complete a sale of land because it has been requisitioned he is not entitled to ask for reasonable time to see whether the requisition notice is withdrawn. A person cannot say that he is ready and willing to tender something which is not in his possession and then demand that the intending purchaser ought to have given him a reasonable time within which to get in the property. If an

(1) (1876) 2 Ch. D. 499, 505.
(2) [1915] A. C. 386.
(3) [1895] 2 Ch. 603.
(4) [1925] Ch. 350.
(5) (1877) 2 C. P. D. 342.

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objection is going to be taken that a proper tender was not made, then it must be taken at the time of the incomplete tender: see *Atkin* v. *Acton* (1). In the court below, Vaisey J. decided that the conduct of the vendor and his inability to give vacant possession of the land on the date fixed in the conditions of sale called for the exercise of his discretion under s. 49, sub-s. 2, of the Law of Property Act, 1925, and he ordered that the deposit be returned to the purchasers. That discretion was properly exercised and ought not to be interfered with: see *Evans* v. *Bartlam* (2). "Where Parliament has "invested the court with a discretion which has to be "exercised in an almost inexhaustible variety of delicate "and difficult circumstances, and where Parliament has not "thought fit to define or specify any cases or classes of cases "fit for its application, this court ought not to limit or restrict "that discretion by laying down rules within which alone the "discretion is to be exercised:" per curiam in *Wickins* v. *Wickins* (3). If the vendor is unable to complete, the purchaser has the right to invoke the discretion conferred on the court by the section to recover the deposit.

Pascoe Hayward in reply.

Cur. adv. vult.

UTHWATT J., read the judgment of the court in which he stated the facts and continued: It appears to us preferable, first, to decide what was the legal position at the date of completion, and then, so far as necessary, to consider the construction and effect of s. 49, sub-s. 2, of the Law of Property Act, 1925.

The first question is whether the power to enter into possession conferred by reg. 51 of the Defence (General) Regulations, 1939, was effectively exercised by the letter of June 10, 1943. The formal question is not whether possession was taken, but whether the power to take possession was exercised. It is contended by the vendor, first, that the power is not effectively exercised unless and until there has been an actual entry on the land by a competent authority, or, put in another way, that it cannot be exercised by a notice given to the person in occupation: secondly, that, if this be wrong, the letter of June 10, on its true construction did not amount to a notice that the

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(1) (1830) 4 Car. & P. 208.

(2) [1937] A. C. 473.

(3) [1918] P. 265, 272.

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power was thereby being exercised. If the power was exercised, it cannot be disputed that, although actual entry on the lands was never made, the vendor was unable to give vacant possession within the meaning of the contract. Disposition of possession would, in that event, have passed out of the vendor's control.

On the construction of the regulation we are of the opinion that actual entry on the land is not necessary for the due exercise of the power. The regulations contain no provision determining the manner in which the power to take possession is to be exercised. That is left at large. The method of exercise is, therefore, to be determined by considering the terms of the regulation in the light of the object sought to be achieved by it as gathered from its terms. Reading the regulation as a whole, its point and substance appear to be to enable the Crown, where national interests so demand, through the action of the competent authority, to acquire an interest in possession in land—that is to say an "immediate "interest" as distinct from a "future interest," carrying with it the rights of user and of authorizing user specified in the regulation. Actual occupation by the Crown is not demanded by all the purposes set out in the regulation. What is required is that the immediate interest—an interest in possession—entitling the Crown to control of the land should be at the disposition of the Crown. Actual entry is, no doubt, one method of exercising the power given by the regulation, but it is not, we think, the only method, for the regulation itself proceeds on the footing that actual entry is not necessary for the due exercise of the power. The competent authority is authorized, under para. (I.) of reg. 51, to take possession of any land and to give such directions as appear to them expedient in connexion with the taking of possession of "that "land." Paragraph I (A.) provides that any constable may take steps and use force for securing compliance with directions given to any person requiring him to give up possession of the land. It is, therefore, assumed by the regulation that the power to take possession has been effectively exercised, although de facto possession has not been obtained. Paragraph (6.) of the regulation proceeds on the same basis as para. I (A.). If actual entry be not necessary, there can, we think, be no doubt that the power is effectively exercised by notice which fairly brings to the mind of the person affected that the power is being exercised. A present intention stated to be exercised and communicated to the persons concerned is sufficient.

On the second point taken, namely, whether the notice was a valid notice, stress is laid on the phrase " we are taking " possession of the above premises " and on the fact that the description given to the premises is " the whole of Ferry House, " Shillingford, and part of the surrounding grounds and out- " buildings to be indicated later," and it is argued that, therefore, the letter as a whole discloses merely an intention to exercise the power in futuro and not an exercise of the power presently made. We do not accept that contention. In our view, the letter of June 10, 1943, is directed to setting forth the state of affairs which the competent authority intends should result from its service and not to indicating what may happen in the future, and we think the letter would be so read by any ordinary recipient. The requisition number on the letter and the sending of a form of claim for compensation calling on the recipient to state inter alia the date when possession was taken make the intention clear. Nor is this conclusion displaced by the circumstance that, in the notice, a portion of the premises to which the letter relates, is referred to as a part to be hereafter specified. The notice was necessarily ineffective except as regards Ferry House, but the inclusion of premises not attempted to be defined in the description does not invalidate the notice as respects Ferry House. We may add that the distinction drawn between Ferry House and the rest of the premises in the description can be relied on as marking something which is being done from that which is suggested will hereafter be done. No valid objection can, therefore, be taken to the form of the notice. In our opinion, therefore, the vendor was not at the date of completion able to give vacant possession of the property pursuant to his bargain.

The second point taken on behalf of the vendor is that, assuming that the vendor was unable to give vacant possession on the date fixed for completion, the stipulation as to the date of completion was not of the essence of the contract; that accordingly, the purchasers were not entitled forthwith to repudiate the contract; that their proper course in law was to make time the essence of the contract by giving notice to the vendor calling on him to complete and give vacant possession within a reasonable time; and that it was only on such failure that any right to repudiate could arise. We cannot accept this

C. A.

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James Macara, Ld. v. Barclay.

contention. The position of the parties at all material times was that the vendor was asserting, not that he wanted time to enable him to give vacant possession, but that he could then give vacant possession, and that the purchaser was asserting that the vendor could not give vacant possession. Time did not enter into the picture. Why should the purchaser be bound to offer a concession as to the time for completion when the vendor was denying the need for it? Considerate dealing between the vendor and purchaser in the matter of the contract did not in these circumstances require that any such offer should be made. One may assume that, purely as a matter of construction of the contract, completion on the day agreed was not of the essence of the contract, but that does not mean that the agreed date may be disregarded for all purposes. One way of testing whether or not the purchaser is, before taking the stand that by reason of the vendor's breach he is discharged from the contract, bound first to give a notice calling on the vendor to complete within a reasonable time, is by posing the question whether or not under the old practice of a court of equity, the court would in the circumstances of the case and in the absence of any such notice grant an injunction restraining the purchaser from taking proceedings at law to recover his deposit: see *Stickney* v. *Keeble* (1). In this case it is obvious that no such injunction would have been granted. There was, therefore, no necessity to serve the suggested notice. Taking this view of the case, the purchaser was entitled at law to recover the deposit. That concludes the matter, for, whatever be the true construction of s. 49, sub-s. 2, of the Law of Property Act, 1925—a matter on which we express no opinion—the jurisdiction of the court under that section cannot in the circumstances of this particular case be invoked to negative the legal right of the purchaser. The appeal is, accordingly, dismissed with costs.

Appeal dismissed.

Solicitors for vendor: *Simmonds & James.*
Solicitors for purchasers: *Clifford-Turner & Co.*

Reported by H. Greenfield, Esq., Barrister-at-Law.

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(1) [1915] A. C. 386.

OUARDI KAVALA, LIMITED, AND ANOTHER *v.* GRIGG AND OTHERS.

1944
Nov. 28.

Atkinson J.

Emergency legislation—Requisition—Land—Taking possession—Willingness of owner to give possession by agreement—Provisions of Defence Act, 1842 (5 *&* 6 *Vict., c.* 94) (*as amended*) *not complied with—Defence* (*General*) *Regulations,* 1939, *reg.* 51 (*as amended*).

Regulation 51 of the Defence (General) Regulations, 1939, as amended, authorizes the Secretary of State for War (although there be no actual invasion of the realm by the King's enemies or similar imminent peril) to take possession of land by requisitioning, notwithstanding that the owner or other competent person is ready and willing to treat and contract concerning the required use and possession of such land and to give the same subject to an agreement.

The taking possession of land by or on behalf of the Secretary of State for War in the purported exercise of the powers under reg. 51 is not governed by the provisions of the Defence Act, 1842, as amended by any later enactment, and, therefore, is not ultra vires if the provisions of those Acts are not complied with.

SPECIAL case tried before Atkinson J.

The second plaintiff, the Hon. Mrs. Kayser, was the tenant for life of certain premises known as The Springs and the freeholder of certain premises known as The Mill House, both situate at North Stoke in the county of Oxford. The greater part of The Springs had been let by the second plaintiff to the plaintiff company, Ouardi Kavala, Ld., by a written agreement for a furnished letting, dated January 20, 1941. The second plaintiff had authority to act for the plaintiff company. The first defendant, Sir James Grigg, was the Secretary of State for War, and the competent authority for the purposes of Part IV. of the Defence (General) Regulations, 1939. The second defendant, Col. W. R. Meredith, was colonel in charge of administration under the control, command, or authority of the first defendant, and one of a class of persons to whom the first defendant as competent authority had delegated his functions, and the necessary authority under reg. 51 of the regulations. In the matters hereinafter referred to the second defendant acted or purported to act in exercise of such authority and on behalf of the first defendant. The third defendant, R. A. C. Harding, since January, 1943, had been the quartering commandant in the county of Oxford when he succeeded in that office or capacity one Lieut.-Col. D. E. Seymour Cousins. He had acted under the control, command, and authority, and on behalf, of the first and second defendants.

On or about October 12, 1942, the second plaintiff was served with two requisition notices in respect of The Springs and The Mill House, and, on October 29, 1942, she was served with a third requisition notice in respect of The Springs or certain parts thereof. Both before and after the service of the requisition notices the second plaintiff on her own behalf and on behalf of the plaintiff company offered and was ready and willing to negotiate, treat, agree, and contract with the first defendant or any person authorized to act for him on his behalf concerning the use and possession of the premises, and to give such use and possession as and when required by him subject to an agreement as to the rent and all other terms for such use and possession. Notwithstanding this offer the first defendant or those acting for him or on his behalf did not negotiate, treat, agree, contract, or deal otherwise with the plaintiff in respect of the proposed use and occupation of the premises, but proceeded forthwith to requisition the premises. Both before and after the service of the requisition notices the second plaintiff, on her own behalf and on behalf of the plaintiff company, repeatedly protested and objected that, by reason of the facts set out above :— (*a*) The purported requisition and the subsequent actual taking of possession of the premises was unauthorized, illegal, and in excess of any powers under any enactment or regulation ; (*b*) the requisition notices (which were never acknowledged) were not binding on the plaintiffs and were void and of no force and effect ; (*c*) by reason of the fact that the use and possession of the premises had been offered to the first defendant or those acting for him or on his behalf, there was not under reg. 51 of the Defence (General) Regulations, 1939 (as amended), or under any enactment any power of or any justification for requisitioning or otherwise entering into possession of the premises without the consent of the owner or other person sufficiently interested in the land concerned. By reason of the requisitioning the plaintiffs, under protest and without prejudice to their just rights and claims, gave up possession on November 5, 1942, on which date the first defendant, by his servants or agents, without consent or leave of the plaintiffs entered into and took possession of the premises.

The plaintiffs began an action against the defendants on

March 26, 1943, by writ of summons whereby the plaintiffs claimed (1.) a declaration (*a*) that the requisition notices in respect of The Springs and The Mill House were invalid, void and of no effect; (*b*) that the purported taking possession of the premises was not justified by law and was ultra vires and void; (*c*) that the plaintiffs were not bound by the requisition notices and were under no obligation to comply with the same; (*d*) that the plaintiffs were entitled to restitution; (*e*) that the plaintiffs were entitled to mesne profits. (2.) An injunction restraining the defendants from in any way further acting on the requisition notices or from taking any other or further steps directly or indirectly calculated to interfere with the premises or the plaintiffs' possession thereof or with the plaintiffs' chattels. (3.) An inquiry into damage.

The parties concurred in stating the question of law arising therein in a case for the opinion of the court. The case contained the facts set out above and also the contentions of the parties which were as follows: The plaintiffs contended (*a*) That (except in the event of an actual invasion of the realm by the King's enemies or of similar imminent peril) reg. 51 of the Defence (General) Regulations, 1939, did not empower the Secretary for War, as a competent authority, in his discretion to take possession of land without regard to any other modes of obtaining or acquiring such possession, and, in particular, did not authorize such requisitioning where an owner or other competent person was ready and willing to give the required use and possession by agreement; (*b*) that the power of the Secretary for War to take possession of land under reg. 51 of the Defence (General) Regulation, 1939, as amended, was governed by the provisions of the Defence Acts, 1842 to 1873, and that these provisions had not been complied with in that the plaintiffs were not given notice to treat and agree and that they were not given any opportunity of treating and agreeing in respect of the use and possession of the premises. The defendants contended that the Secretary for War, as competent authority, had, under reg. 51, power in his discretion to take possession of any land it appeared to him necessary or expedient so to take for any of the purposes stated in the regulation without any limitation in respect of procedure form or otherwise and irrespective of the consent or otherwise of any person interested in such land.

The questions for the opinion of the court were: 1. Did reg. 51 of the Defence (General) Regulation, 1939, as amended, authorize the Secretary for War (except in the event of actual invasion of the realm by the King's enemies or of similar imminent peril) to take possession of land by requisitioning notwithstanding that the owner or other competent person was ready and willing to treat and contract concerning the required use and possession of such lands and to give the same subject to an agreement ? 2. Was the taking of land by or on behalf of the Secretary for War in the purported exercise of the powers under reg. 51 governed by the provisions of the Defence Act, 1842, as amended by any later enactment, and therefore ultra vires if the provisions of the said Act or Acts were not complied with ?

Lyttleton Howes for the plaintiffs.
Valentine Holmes for the defendants.

ATKINSON J. The question in this case is whether the defendants properly exercised certain powers with regard to taking possession of land The essential fact for the raising of the point of law in this case is that from first to last the second plaintiff was willing to let the authorities have possession of the premises on reasonable terms, and to negotiate. Her complaint is that, notwithstanding that she had made this offer and that they knew she was ready and willing to negotiate, they treated her as not willing to negotiate and served her with requisition notices, instead of with a notice to treat. Her case is that they had no power so to act.

Properly to appreciate the point that has been raised involves a little history. Under the Defence Act, 1842, certain powers were given to Her Majesty's ordnance. Section 9 provides : " It shall be lawful for the said principal " officers for the time being of Her Majesty's ordnance from " time to time to contract for and purchase, for and on behalf " of Her Majesty, her heirs or successors, any messuages, " buildings, castles, forts, lines, or other fortifications, manors, " lands, tenements, or hereditaments, or to take or purchase " any lease of the same which shall in their judgment be " desirable to be purchased, for and on behalf of the said " ordnance or barrack services, or the defence of the realm, " upon such terms as to the said principal officers shall seem " meet, and to enter into any contracts necessary for that " purpose." It must be remembered that this power was limited to occasions when these officers believed that the purchase was necessary for the defence of the realm. Section 16 provided: "It shall be lawful for the principal officers of "Her Majesty's ordnance for the time being to enter on, "survey, and mark out, or to cause to be surveyed and "marked out, any lands, buildings," which they wished to acquire. The last three lines of the section are these: "either "for the absolute purchase thereof, or for the possession "or use thereof during such time as the exigence of the public "service shall require." The authorities, therefore, had two powers—one the power of acquisition or purchasing leases under s. 9 where it was thought to be necessary for the defence of the realm, and also the power of marking out property either with the idea of absolute purchase or merely with the idea of acquiring possession or use during such time as the exigence of the public service should require. Section 19, which is the section relied on by the plaintiffs in this case, is to this effect: "In case any such bodies or other persons hereby authorised to "contract on behalf of themselves or others as aforesaid, or any "other person or persons interested in any such lands, buildings, "or other hereditaments which shall be so marked out and surveyed as aforesaid, shall for the space of fourteen days next "after notice in writing subscribed by or on behalf of the said "principal officers shall have been given to the chief officer or "officers of any such body, or to such other persons hereby "authorised to contract on behalf of others, or interested "themselves, as aforesaid, or left at his, her, or their usual "place of abode, refuse or decline to treat or agree, or by "reason of absence shall be prevented from treating or "agreeing with the said principal officers, or shall refuse to "accept such sum of money as shall be offered by the said "principal officers as the consideration for the absolute "purchase of such lands, buildings or other hereditaments, or "such annual rent or sum as shall be offered," then the ordnance authorities can apply to two justices of the peace for an order putting them into immediate possession. The section does not say what are to be the contents of the notice. It merely says: "For the space of fourteen days next after "notice in writing subscribed by or on behalf of the said "principal officers shall have been given to the chief officer "or officers or any such body, or to such other persons hereby "authorised to contract on behalf of others, or interested "themselves, as aforesaid, or left at his, her, or their usual "place of abode refuse or decline or treat" but it is clear that what was meant was a notice to treat, and in s. 8 of the Military Training Act, 1939 (2 & 3 Geo. 6, c. 25), the notice in s. 19 of the Act of 1842, is described as a notice to treat. Thus s. 19 lays down with precision how the War Office is to obtain either the ownership or possession of land for the exigence of the public service. The method laid down is this. A notice to treat has to be given to be followed by an interval of fourteen days. If the parties during that time agree, the authorities do not want a statutory power to get into possession, because they go in as willing purchasers or licensees, but, if the person who has been served with this notice will not negotiate, immediate possession is obtained by going to two justices.

One other section is important, s. 23. The marginal note there is: "Lands not to be taken for the defence "of the realm without consent of the owners, unless in "certain cases." The section provides: "No such lands, "buildings, or other hereditaments shall be so taken without "the consent of the owner or owners thereof, or of any such "person or persons as aforesaid, acting for or on the behalf "of the owner or owners thereof, unless the necessity or "expediency of taking the same shall be first certified by the "Lord Lieutenant, or two of the deputy lieutenants, or by "the governor or two deputy governors of the county or" riding in which the hereditaments are situate unless authorized by a warrant of the treasury, " or unless the enemy shall have "actually invaded the United Kingdom at the time when "such lands, buildings, or other hereditaments shall be so "taken." That was the position under the Act.

Then came the Defence Act, 1860. It dealt merely with land required for the erection of works of defence for the protection of the royal arsenals and dockyards at certain ports and so on. It has no relevance to the present case until we come to s. 45, which provides that notice has to be served under the hand of the Solicitor to the War Department, and, s. 46, which amends the Defence Act, 1842. The provisions concerning the mode of serving notices contained in the Act of 1860 are to be applied where lands are taken under the Act of 1842, as also are the provisions concerning the determination of the amount of compensation for lands taken otherwise than by agreement.

Then came the present war. The first relevant step that was taken by Parliament was to pass the Emergency Powers

(Defence) Act, 1939. Subsection (1) of s. 1 says: "Subject "to the provisions of this section, His Majesty may by Order "in Council make such regulations (in this Act referred to as "'Defence Regulations') as appear to him to be necessary or "expedient for securing the public safety, the defence of the "realm, the maintenance of public order and the efficient "prosecution of any war in which His Majesty may be engaged, "and for maintaining supplies and services essential to the "life of the community." Subsection (2) is: "Without "prejudice to the generality of the powers conferred by the "preceding subsection, defence regulations may, so far as "appears to His Majesty in Council to be necessary or expedient "for any of the purposes mentioned in that subsection . . . . "(*b*) authorize—(i.) the taking of possession or control, on "behalf of His Majesty, of any property or undertaking; "(ii.) the acquisition on behalf of His Majesty, of any property "other than land." The two points to observe about that section are, first, that the occasions when these powers can be exercised are far wider than those contained in s. 9 of the Act of 1842. There, it will be remembered, the words were: "The defence of the realm." In this section the defence of the realm is only one of the matters on which the power of making regulations is based. The other point to notice is that there is only power to authorize the taking of possession of land. There is no power to acquire land. Following that, regulations were made and the regulation with which I am concerned is reg. 51, which provides: "A competent authority, "if it appears to that authority to be necessary or expedient "so to do in the interests of the public safety, the defence of "the realm or the efficient prosecution of the war, or for "maintaining supplies and services essential to the life of "the community, may take possession of any land, and may "give such directions as appear to the competent authority "to be necessary or expedient in connexion with the taking "of possession of that land." Then sub-reg. (1A.) is: "Any "constable may take such steps and use such force as appears "to him" necessary to secure compliance with the first sub-regulation; and sub-reg. (4): "The operation of so much of "s. 19 of the Defence Act 1842, as amended by any subsequent "enactment, as relates to the putting of the Crown into "immediate possession of land, shall, except as respects "things done before the date of the coming into force of this "regulation, be suspended during the continuance in force "of this regulation."

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What is the argument advanced on behalf of the second plaintiff? Her complaint is that she got no notice to treat although all along she was a willing negotiator, and that the provisions of s. 19 of the Act of 1842 were ignored, and the argument is that reg. 51 has to be construed as if it were an addition to s. 19, that is to say, as if the two together formed one code It is argued that all that is cut out of s. 19 is that part which relates to the putting of the Crown into immediate possession, and that that merely cuts out the necessity for going to two justices and obtaining an order for possession, but that the earlier step to be taken, that is, the serving of a notice with which, in effect, the person served has refused to comply is not cut out. On the other hand, Mr. Valentine Holmes says that there is in this defence regulation a complete code. By way of illustrating its completeness he points to the fact that the regulation was almost immediately followed by an Act to provide for compensation in cases where the powers prescribed by the regulation were exercised, special tribunals were created, and special regulations were made showing how the compensation was to be assessed, whereas, if the compensation was to be assessed under s. 19 of the Act of 1842, it would be assessed under the Compensation Act of 1919, which has taken the place for this purpose of the Lands Clauses Act. He contends that this is a code complete in itself, and that s. 19 has nothing to do with a mere taking of possession. The department agrees that, if they want to acquire the ownership of land or houses, they have to proceed in accordance with the Act of 1842, as amended, but they maintain that, to get possession, it is not necessary to go to the justices as possession can be taken by virtue of reg. 51.

In my view Mr. Valentine Holmes' argument is unanswerable. I think that in reg. 51 there is a complete code, and that the words mean exactly what they say, viz.: that a competent authority may take possession of land. The regulation does not say that the power of taking possession which is given by s. 19 shall apply or shall be wider or narrower. It creates an entirely new power, which has no relation to what can be done under s. 19. If that view is right, there is an end to the case. Construing those words in the way any ordinary person would construe them, I construe reg. 51 as saying: " A competent authority may take possession." That is what the defendants have done. There is nothing there requiring even a notice of requisition to be given.

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The point has been considered recently in *Carltona* v. *Commissioner of Works* (1), where the Master of the Rolls said: "It is to be observed that, in order to exercise the "requisitioning powers conferred by the regulation no "notice is necessary at all and, therefore, the question of "the goodness or badness of a notice does not in truth arise." Sub-regulation 4, which is so much relied on by the plaintiffs, is explained by the fact that the first form of that sub-regulation suspended the operation of s. 19 altogether, but then it was realized that the power of acquiring the ownership of land had been interfered with because that section still remained a relevant section for the purpose of the acquisition of land. Therefore, sub-reg. 4 of reg. 51 was modified so that only so much of s. 19 was excluded as relates to the putting of the Crown into immediate possession of land. That is interesting because it meant that, even where the department was intending to acquire land, their power to take possession arose or remained under reg. 51. The notice to treat is only necessary during the war when the department is seeking power to acquire land.

My answers to the two questions put to me therefore are: to the first question "Yes"; to the second question "No." I think the power of taking possession under reg. 51 is a totally separate and different power from that conferred by the Act of 1842 and is governed solely by what appears in the regulations of 1939 and is not in any way governed by anything contained in the Act of 1842.

Judgment for defendants.

Solicitors for plaintiffs: *Roche, Son, & Neale.*
Solicitor for defendants: *Treasury Solicitor.*

R. F. S.

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(1) [1943] 2 All E. R. 560, 562.

REX *v.* HURLE-HOBBS.

Ex parte SIMMONS.

1944

Dec. 5.

Viscount Caldecote C.J., Singleton and Cassels JJ.

Local government—Audit of accounts—District auditor—Power to require attendance of witness—Failure of witness to attend—Statutory penalty imposed on summary conviction—Continued non-attendance—Issue of subpœna—Jurisdiction—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 5), *s.* 225, *sub-ss.* 1, 2.

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v.
HURLE-
HOBBS.

The applicant, a member of a firm of accountants which acted as auditors for a company, was served by the respondent, a district auditor, with a notice under s. 225, sub-s. 1, of the Local Government Act, 1933, requiring him to attend an audit at which the accounts of the company formed a subject of inquiry and to produce certain documents. He failed to produce the documents, and, after a second notice had been sent to him, he was summoned under sub-s. 2 of s. 225 and fined. He was then sent a further notice to attend, which he failed to obey, and, at the instance of the respondent, a subpœna ad testificandum and duces tecum was issued by the Crown Office. On a motion by the applicant to set aside the subpœna :—

Held, that, as the legislature in s. 225, sub-s. 1, of the Act had created an obligation and had enforced the performance of it in a specified manner by the provisions of sub-s. 2, it was not open to the auditor to resort to a different process to compel compliance with the law, and that, accordingly, there was no power to issue a subpœna.

MOTION to set aside a subpœna.

The applicant, Richard William Simmons, was the senior partner of a firm of accountants which acted as auditors for Hortensia Garages, Ld. In a claim by that company against the London County Council its accounts were the subject of an audit by the respondent, the district auditor of the London Audit District. On September 15, 1944, the applicant received from the respondent a notice under s. 225 of the Local Government Act, 1933 (1) requiring him to attend the audit and to produce the trading accounts and the profit and loss accounts of Hortensia Garages, Ld. for the years 1941, 1942, 1943. The applicant attended the audit and stated that his firm were auditors, and not accountants for the company, that he had not in his possession the documents he was asked to produce, and that he could not produce any papers he might have without the authority of his clients. On October 4, he was sent another notice requiring him to produce the documents, accompanied by a letter threatening proceedings under sub-s. 2 of

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(1) Local Government Act, 1933, s. 225, sub-s. 1: "A district "auditor may by writing under "his hand require the production "before him of all books, deeds, "contracts, accounts, vouchers, "receipts and other documents "which he may deem necessary "for the purpose of the audit, "and may require any person "holding or accountable for any "such document to appear before "him at the audit . . . ."

By sub-s. 2: "If any person "neglects or refuses to comply "with any such requirement, he "shall be liable on summary con"viction to a fine not exceeding "forty shillings . . . ."

s. 223 of the Local Government Act, 1933, in the event of his non-compliance with the notice. He did not attend, and on October 19 he was served with a summons issued by the respondent. He appeared by counsel at the hearing of the summons and was ordered to pay a fine of forty shillings and 3*l*. costs. On November 6, he received a further notice requiring him to attend the audit and produce the documents. He again did not attend and on November 28, he was served with a subpœna ad testificandum and duces tecum requiring him to attend with the documents at the County Hall, Westminster, on December 5. The applicant thereupon brought the present motion to set aside the subpœna on the grounds that it was irregular, oppressive, contrary to law and an abuse of the process of the court.

Garland for the applicant. There was no power to issue a subpœna in this case. Section 225, sub-s. 1, of the Local Government Act, 1933, enables the auditor to require the attendance of witnesses and the production of documents, and sub-s. 2 imposes a penalty for non-compliance with his requirements, and where a statute creates an obligation and directs that it should be enforced in a specific manner it cannot be enforced in a different way: per Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (1). The general practice in regard to the issuing of subpœnas is set out in Short & Mellor's Crown Office Practice, 2nd ed., p. 405, from which it appears that, in the absence of a special power to require the attendance of witnesses given by statute or rule, the power of the King's Bench Division may be invoked to assist inferior tribunals to compel the attendance of witnesses by subpœna, in the absence of other means of doing so. The district auditor, however, was not a properly constituted tribunal for this purpose, and, even if he were, he could not ask the King's Bench Division to issue a subpœna since the legislature has provided a particular method for securing the attendance of witnesses. If he were allowed to subpœna them, the provisions of s. 225 would be entirely unnecessary.

Simes for the respondent. The subpœna was properly issued by the Crown Office. That a district auditor is a tribunal is clear from the sections of the Local Government Act, 1933, which define his duties. In *Rex* v. *Roberts* (2), Farwell L.J. said that he was satisfied that an auditor had judicial duties to

(1) [1898] A. C. 387, 394.

(2) [1908] 1 K. B. 407, 438.

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perform. He is, therefore, entitled, as an inferior tribunal, to seek the assistance of the King's Bench Division by obtaining a subpœna. The High Court has always acted on the principle that, where a remedy provided to enforce the carrying out of an obligation is insufficient, it will interfere to prevent the doing of something which is contrary to law. The remedy given by s. 225, sub-s. 2, may be effective in ninety-nine cases, but in the present case it proved useless. Even supposing that the appellant was summoned a number of times and fined on each occasion, it would not secure his presence at the audit. It is clear from the language of Swinfen Eady L.J. in *Rex* v. *Wiltshire Appeal Tribunal* (1) that the Crown Office still has power to issue a subpœna if it is necessary to secure the attendance of a witness, though, in view of the fact that statutes have given power in some cases to enforce such attendance, the occasions for making applications to the Crown Office arise less frequently than in the past. The observations of Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (2) do not apply to the present case. The auditor here, after serving a notice on the applicant under s. 225, sub-s. 1, and issuing a summons under sub-s. 2 which was not successful in producing the documents, was entitled to come to the High Court and say that, as the sanction contained in the Act had proved ineffective, he as an inferior tribunal asked the court to grant the alternative remedy of a subpœna, the right to issue which has always existed and is inherent in the High Court. The case would have been different if the auditor, after serving the original notice, had endeavoured to force compliance with it in any other way than that authorized by sub-s. 2. It is because the statutory powers proved ineffectual that he was compelled to ask for the assistance of the High Court.

VISCOUNT CALDECOTE C.J. This is a motion to set aside a subpœna duces tecum which has been issued out of the Crown Office, on the ground that its issue was irregular, oppressive, contrary to law and an abuse of the process of the court. The motion is based on the submission that in view of the provisions of s. 225, sub-s. 2, of the Local Government Act, 1933, the power to issue such a subpœna has been replaced by the power contained in the sub-section. On the other hand,

(1) (1916) 86 L. J. (K. B.) 121, 137.

(2) [1898] A. C. 387, 394.

it was contended that there was power to issue the subpœna in pursuance of the general power of the King's Bench Division to assist inferior tribunals by enforcing the attendance of witnesses, and it is convenient at this point to read a passage from the judgment of Swinfen Eady L.J. in *Rex* v. *Wiltshire Appeal Tribunal* (1), where he made some observations with regard to the power or practice of the King's Bench Division to lend its aid to inferior tribunals. He said: " Then, with " regard to the attendance of witnesses before them, the " tribunals, being inferior courts and not in this respect in the " position of one of the superior courts, have in themselves no " power to enforce the attendance of witnesses. For that " reason they have to invoke the assistance of the King's Bench " Division to compel the attendance of witnesses in proper " cases, and the master of the Crown Office, on being satisfied " that they are proper cases has power to issue a subpœna. " Therefore it must not be considered that the subpœna in " this case was improperly issued. The powers of the King's " Bench to give such asistance is referred to in many cases. " Thus in *Reg.* v. *Greenaway* (2), Lord Denman, in delivering " the judgment of the court, said: ' On the general point no " ' doubt can be entertained. The course of practice, during " ' a long period, was certified to us by our officer; and it is " ' necessary for the due administration of justice. This " ' court has in all times lent its aid to inferior tribunals, where " ' they have wanted the means of enforcing the attendance of " ' witnesses. If viva voce evidence is alone required, the " ' ordinary subpœna ad testificandum will attain the object; " ' if documents are wanted, recourse must be had to the " ' equally well-known writ of subpœna duces tecum. The " ' principle is well and forcibly asserted in the important " ' judgment delivered by Lord Ellenborough in *Amey* v. " ' *Long* (3).' True it is that since this case power has been " given to tribunals which had not the authority themselves to " compel the attendance of witnesses, and therefore this power " is much less frequently resorted to than before, and in some " of the books it is said that of late years applications have " been discouraged; but the power exists, and is there and it " cannot be said that in the present case the subpœna was " not properly issued." That passage must be taken to state the current practice for the purpose of the present case.

(1) (1916) 86 L. J. (K. B.) 121, 137.
(2) (1845) 7 Q. B. 126, 134.
(3) (1808) 9 East. 473.

The question which arises for decision is whether in view of the provisions of s. 225, sub-s. 2, of the Local Government Act, 1933, the power to which Swinfen Eady L.J. was referring exists with regard to the enforcement of the attendance of persons required to produce documents where they refuse to comply with the summons or the direction or the requisition of the district auditor under s. 225, sub-s. 1, of the Act, which is a re-enactment in slightly different language of a provision to be found in the Public Health Act, 1875. It has been pointed out to us, I think rightly, that a district auditor acting under the code contained in the Local Government Act, 1933, is performing judicial duties. I am satisfied on that point, not merely by what Farwell L.J. said in *Rex* v. *Roberts* (1), but also by the provision in the Act which gives a right of appeal from the district auditor's decision. Farwell L.J. said in the case to which I have referred: "Sub-sections 6 and 7 appear "to me conclusive to show that the auditor has functions of "a judicial nature to perform." The auditor being in that position, and being charged with a duty under the Act of holding an audit and taking action in certain events, requires evidence to be available to him so that he may perform his duty. It is very desirable, therefore, that he should be armed with sufficient powers to bring that evidence before him. It would indeed, be absurd to suppose that he could perform his duty if he were unable to obtain the materials he required. Accordingly, Parliament in its wisdom—and it is for us not to criticize, but to accept its decision—thought it necessary to provide a means by which the district auditor should be able to obtain the necessary evidence and documents. Those means were provided by s. 225, sub-s. 1, of the Act, and, as it necessarily followed that some sanction must be given to enforce compliance with the auditor's requisition, that was provided in sub-s. 2, which imposes a fine not exceeding forty shillings if any person neglects or refuses to comply with any such requirement.

Does that enactment exclude a resort to that aid which the King's Bench Division may give to inferior tribunals? On the one hand, it is said by Mr. Garland that Parliament, having provided a sanction, cannot have intended that some greater penalty by way of sanction such as that of attachment for non-obedience to a subpœna should be imposed. Mr. Simes, on the other hand, says that, even though a person

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(1) [1908] 1 K. B. 438.

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Viscount Caldecote C.J.

may be subjected to a penalty of forty shillings, it does not follow that it would be possible by that means to enforce his attendance, however often he might be fined, and, consequently, that it was important that the power of issuing a subpœna should be exercised, not, perhaps, in the last resort, but on a proper occasion. In the present case the applicant was required to produce certain documents which he admitted to be or to have been in his possession. He had been fined the maximum penalty for non-compliance with the auditor's requirement and the auditor now says in effect: "The time has "come when I must turn the screw more tightly to enforce the "attendance of the witness and the only means open to me is "to seek the aid of the King's Bench Division by obtaining "a subpœna duces tecum."

As between the above two views—and there is a good deal to be said for each of them—I have come to the conclusion that the right view is that Parliament intended to exclude the powers exerciseable by the King's Bench Division, and that a person in the position of a district auditor who is charged with certain duties must rely on the weapons which Parliament has given him and not on some other weapons which in other circumstances might be available. In the course of the argument the court referred Mr. Simes to the observations of Lord Halsbury L.C., in *Pasmore* v. *Oswaldtwistle Urban District Council* (1). The facts of that case were different from those of the present. The two material provisions under consideration were, first, s. 15 of the Public Health Act, 1875, which requires a local authority to make such sewers as may be necessary and keep them in repair, and, secondly, the terms of s. 299 of the Act which provide that: "where complaint "is made to the Local Government Board that a local authority "has made default . . . . the Local Government Board . . . . "shall make an order limiting a time for the performance of "their duty in the matter of such complaint." The appellants sought to enforce the performance by the local authority of their duty by an application for a mandamus, and Lord Halsbury L.C. said: "There is no such provision in the "statute, and it appears to me that the whole purview, object "and purpose of the statute is one which would not justify "such an addition to the language of the mandamus." Then he said: "The principle that where a specific remedy is given "by a statute, it thereby deprives the person who insists upon

(1) [1898] A. C. 387, 394.

"a remedy of any other form of remedy than that given by "the statute, is one which is very familiar and which runs "through the law. I think Lord Tenterden accurately states "that principle in the case of *Doe* v. *Bridges* (1). He says: "'where an Act creates an obligation and enforces the "'performance in a specified manner, we take it to be a general "'rule that performance cannot be enforced in any other "'manner.'" The principle there stated seems to me to be most material for our consideration. It means that where Parliament has prescribed a duty and has imposed a particular penalty for a breach of that duty it is not open to a party to say that a more specific remedy can be enforced by resorting to a different process to compel compliance with the law. The point is not easy, and I have found my mind turning from one consideration to another. On the one hand, I am not satisfied that the applicant has any merits, if that is a relevant consideration, and, on the other, I have felt pressed by Mr. Simes' argument that the district auditor ought to have the powers which he claims, to enable him to perform his duties. In the result, I have come to the conclusion that Parliament, having prescribed a duty and having said what the penalty is to be for non-performance of that duty, must be taken to have excluded the right to resort to the King's Bench Division for the aid to which Swinfen Eady L.J. referred in the passage I quoted at the beginning of this judgment. I, therefore, think that this motion to set aside the subpœna must succeed.

SINGLETON J. The practice in regard to the issue of subpœnas is dealt with in Short and Mellor's Crown Office Practice, 2nd ed., p. 405, as follows: "Moreover, the court "has in all times lent its aid to inferior tribunals where they "have wanted the means of enforcing the attendance of "witnesses. But in practice it is not entirely confined to "such cases. Upon that principle subpœnas were issued for "the attendance of witnesses before revising barristers, prior "to the statute, giving them power to summon witnesses, and "even before arbitrators, but in both cases they are now "refused." I suppose that the reason for this refusal was that another means was given of enforcing the attendance of witnesses in those cases. The present case is different from those referred to in the quotation I have read because the statute which created district auditors, or their predecessors in title, provides a remedy in case those whom they require as witnesses fail to attend or those whom they require to produce documents fail to do so. Section 225 of the Local Government Act, 1933, follows quite closely the language of s. 247 of the Public Health Act, 1875. That Act created the system of audit and the officers who are now known as district auditors. I will assume that district auditors are tribunals. The tribunal, the district auditor, is given a remedy in s. 225, sub-s. 2, if the person he requires as a witness fails to attend, in that he can summon the defaulter before the magistrate's court and ask that a fine be imposed on him. That is the remedy or the means of compelling the attendance of a witness given to him by the Act which created his office, and, prima facie, I should have thought that it was his only remedy. I appreciate Mr. Simes' argument that the fact that other means are given for compelling the attendance of witnesses may not take away the power which this court possesses to assist inferior tribunals, but it is of importance to remember that the legislature, when it created the officers now known as district auditors, gave them the means of enforcing the attendance of witnesses. What would be the effect if a district auditor was entitled to go to the Crown Office and say: "A fine has been imposed on this man, but that does not "appear to be enough and I, therefore, ask for a subpœna." If the Master of the Crown Office was satisfied, he might grant a subpœna, which would mean that, on the request of the district auditor, he had come to the conclusion that the means of enforcing the attendance of a witness given by Parliament in sub-s. 2 of s. 225 was not sufficient. I cannot think that that can be right.

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(1) (1831) 1 B. & Ad. 847, 859.

Reference should be made to two other matters. We were referred during the argument to *Rex* v. *Roberts* (1) and to the judgment of Farwell L.J. in which he stated that a district auditor had judicial functions to perform. Cassels J. pointed out that in that case Cozens-Hardy M.R., when dealing with s. 247 of the Public Health Act, 1875, said: (2) "The "statute has enabled an auditor, who, in my opinion, has "no power to administer an oath or to subpœna witnesses, "and who is not a judicial officer in the ordinary sense, to "decide that a member of a local authority has been "guilty of negligence or misconduct." I would add that,

(1) [1908] 1 K. B. 407, 438.

(2) Ibid. 418.

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Parliament having given the auditor a remedy, prima facie, that remedy is the one that should be applied, and the fact that the applicant has not answered to a fine, must not be taken as meaning that some other remedy is necessary. It may not be a very convenient course, but it is open to the auditor to give a further notice to the applicant, and, if he fails to obey it, the auditor may take him before the magistrate again when another fine can be imposed. It is true that such a procedure will take time, and, perhaps, cause a little delay and difficulty, but it may be that the applicant would not like a repetition of the fine and that the procedure would prove efficacious. In any event, Parliament has laid down what should be done and those responsible for the comparatively small penalty which is imposed by sub-s. 2 of s. 225 may have thought that, as in many cases, the person summoned is likely to be a professional man, the serving of the prescribed notice would be sufficient with or without a fine. I am not satisfied that in the circumstances of this case there is any need for the issue of a subpœna, even if there was power to issue it, as in my opinion the remedy provided by the legislature is likely to be sufficient. I agree with the judgment delivered by my Lord.

CASSELS J. I agree.

Solicitors for applicant: *Alfred C. Warwick & Co.*
Solicitors for respondent: *Sharpe, Pritchard & Co.*

P. B. D.

C. A.

WOODWARD *v.* MAYOR OF HASTINGS AND ANOTHER.

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Nov. 8, 9, 10, 27.

Scott, MacKinnon and du Parcq L.JJ.

Limitation of actions—Public authorities protection—School—Governors—School managed under scheme made under Charitable Trusts Acts, 1853 *to* 1894*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21, *sub-s.* 1*—Negligence—Frozen step—Injury to invitee—Negligence of cleaner.*

The governors of a school managed under a scheme made under the Charitable Trusts Acts, 1853 to 1894, and sealed by the Board of Education are not a public authority entitled to the protection of s. 21, sub-s. 1, of the Limitation Act, 1939.

Greenwood v. *Atherton* [1939] 1 K. B. 388, distinguished.

Hastings Grammar School, which was removed, owing to the war, to St. Albans, was accommodated there in part in a congregational church school, the arrangement, which included the use of the services of the church school staff, being made by the Hertfordshire Education Committee. A cleaner, who was paid by the diaconate of the church school, was guilty of negligence in the course of her duties, and as a result a scholar of the grammar school was injured and he brought an action for negligence against the governors of the grammar school. The Court of Appeal found that it was a fair inference on the facts that the cleaner was under the control of the governors, and it was conceded that the governors were, at the least, under the duty towards the scholar of invitors to an invitee:—

Held, that the governors were liable, since they necessarily had to act by agents and the cleaner, their agent, knew or ought to have known of the danger. If the cleaner was not under the control of the governors, still they were liable, since they had delegated their duty either to the diaconate of the church school or to the cleaner.

Pickard v. *Smith* (1861) 10 C. B. N. S. 470 followed. *Haseldine* v. *C. A. Daw & Son Ld.* [1941] 2 K. B. 343 distinguished.

Decision of Hallett J. [1944] K. B. 671 reversed.

APPEAL from Hallett J. (1).

The plaintiff, Cecil Douglas Woodward, an infant aged twelve, was a scholar at the Hastings Grammar School which, in July, 1940, owing to the war, had been removed to St. Albans where it was accommodated in the Abbey Institute and the Congregational Church School, the arrangements being made by the Hertfordshire Education Committee. On the morning of January 14, 1943, the infant plaintiff, being sent by the geography mistress from the church school to fetch boys who were at the Abbey Institute, slipped on the icy surface of a step at the church school, fell and received injuries. Mrs. Clark a cleaner, who was paid by the church diaconate, had that morning brushed the loose snow from the step, but she had not placed thereon ashes or other suitable material and so, as Hallett J. found, had left the step in a dangerous condition. The arrangement made with the church diaconate for the use of the premises included the use of the services of the staff.

Up to April 13, 1910, Hastings Grammar School had been an endowed school within the meaning of the Endowed School Acts, 1869 to 1889. The school was now managed under the terms of a scheme made under the Charitable Trusts Acts, 1853 to 1894, and sealed by the Board of Education on

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(1) [1944] K. B. 671.

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April 13, 1910, by which it ceased to be an endowed school. Under the scheme a management rule provided: "The "governors shall keep in repair all the buildings of the "foundation not required to be kept in repair and insured "by the lessees or tenants thereof." By the scheme, of the fourteen governors of the school, two, the mayor and chairman of the education committee of Hastings were ex officio members, and nine other members were representative of public bodies, six of them being appointed by the Hastings borough council, two by local vestries, and one by the senate of the University of Cambridge. The other three members were co-opted.

On May 21, 1943, the infant plaintiff brought an action, by his mother as next friend, to recover damages for his injuries, alleging negligence, against the defendants as representing the governors of Hastings Grammar School. The defendants pleaded that the action was barred by s. 21 of the Limitation Act, 1939. Hallett J. held that the duty of providing premises fell on the defendants, and that it was their duty to make them as safe for use by the scholars, in the ordinary way in which scholars might be expected to use them, as reasonable care and skill could make them, and that the action would succeed had it not been barred by s. 21. He held that the governors were a public authority which was entitled to the protection of s. 21, sub-s. 1, of the Limitation Act, 1939 (1), and he gave judgment for the defendants. The plaintiff appealed and the defendants cross-appealed.

Eddy K.C. and *S. Lincoln* for the plaintiff. Hallett J., wrongly assumed that the scheme regulating the school was made under the Endowed School Acts, 1869 to 1889, whereas, in fact, it was a scheme sealed by the Board of Education on April 13, 1910, under the Charitable Trusts Acts, 1853 to 1894. The school is not under the management of any local authority, but the mayor of Hastings is an ex-officio governor. Hallett J. would appear to have been influenced in his decision by the civic character of the governing body and the evidence of the

(1) By Limitation Act, 1939, s. 21, sub-s. 1: "No action shall "be brought against any person "for any act done in pursuance, or "execution, or intended execution "of any Act of Parliament, or of "any public duty or authority, or "in respect of any neglect or "default in the execution of any "such Act, duty or authority, "unless it is commenced before "the expiration of one year from "the date on which the cause of "action accrued . . . ."

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headmaster that any financial deficiency was shared by the State and the ratepayers, but the court must not have regard to the civic character of the governing body of a school in determining whether that governing body is a public authority and entitled to the benefit of the provisions of s. 21, sub-s. 1, of the Limitation Act, 1939. The test is whether the governors are acting in pursuance of a public duty. Section 45 of the Endowed Schools Act, 1869, provides that " A scheme shall " not of itself have any operation, but the same, when and " as approved by Her Majesty in Council, shall from the date " specified in the scheme, or if no date is specified, from the " date of the order in council, have full operation and effect " in the same manner as if it had been enacted in this Act." The scheme regulating this school is not within that section, and there is no corresponding provision in the Charitable Trust Acts. The governors of the school were merely administering a charitable trust, and the fact that it was in the public interest that they should do so does not make them a public authority or their work a public duty within s. 21 of the Limitation Act, 1939. [*Special Commissioners of Income Tax* v. *Pemsel* (1) ; *Sharpington* v. *Fulham Guardians* (2); *Williams* v. *Mersey Docks & Harbour Board* (3) ; *Bradford Corporation* v. *Myers* (4) ; *Ayr* v. *St. Andrew's Ambulance Association* (5) ; *Greenwood* v. *Atherton* (6) ; and *Griffiths* v. *Smith* (7) were referred to.]

Beney K.C. and *Dare* for defendants. In deciding whether or not a body is a public authority within s. 21 of the Limitation Act, 1939, there is no one single test. A number of tests must be applied, and the conclusion reached on the balance of the results. It is a matter of degree. In *Bradford Corporation* v. *Myers* (8), Lord Haldane L.C., in discussing the meaning of acts done " in pursuance . . . of any public " duty or authority," within the meaning of the Public Authorities Protection Act, 1893, said : " What causes of " action fall within these categories it may be very difficult " to say abstractly or exhaustively. It is hardly easier to " define a priori the meaning of being done directly than it " is to define the number of grains that will make a heap." It is submitted that in the present case the governors of the school were clearly a public authority within the meaning of s. 21, of the Limitation Act, 1939. They were (1.) controlled to a large extent as regards the management of the school by regulations made by the Board of Education as a condition of the grants made by the board to the school; (2.) the object of the governors was a public one in that it was concerned with the education of pupils who were admitted to the school without distinction except as regards the area from which they came; (3.) all the governors of the school, with the exception of three, were representative of public local interests. Applying these tests, it is clear that on the balance of the facts, the governors were a public authority; since, except for the label, they possessed nearly every other requisite necessary to make them one. As to the cross-appeal, Hallett J. found that the step was not as safe for the scholars of the school as reasonable care and skill could make it. That is not the proper test of the duty as between an invitor and an invitee, which is the one applicable here. The true test is that it is the duty of an invitor to warn the invitee against a danger of which the invitor knows or ought to have known. The doctrine of respondeat superior can have no application here, because there was no transference of the services of the cleaner to the governors of the school merely by reason of the fact that they outlined the duties she was to perform. Under the doctrine of invitor and invitee knowledge cannot be attributed to the former of a danger when that danger has been created by a third person over whom the invitor has no control and who is lawfully on the premises in connexion with the business of persons who are the licensors of the invitor: *Clelland* v. *Edward Lloyd, Ld.* (1). If an occupier borrows or obtains by contract the services of another man's servant and the servant by his negligence causes damage to an invitee of the occupier the invitor will not be liable, since he has no control over the servant. Hallett J. found that Mrs. Clark was the servant of the church diaconate, not of the defendants. The test is not whether the defendants had the benefit of her services, but whether they had the control of her in her work: see the observations of Lord Watson in *Johnson* v. *Lindsay & Co.* (2). An occupier is free from liability to his invitee, if he has entrusted work to a competent person to perform and that person negligently causes damage. The defendants had fulfilled their obligations by arranging for a competent cleaner for the school. *Haseldine* v. *C. A. Daw and Son, Ld.* (1) *Indermaur* v. *Dames* (2); *Marney* v. *Scott* (3); *Norman* v. *Great Western Ry.* (4); and *Century Insurance Co., Ld.* v. *Northern Ireland Road Transport Board* (5) were referred to.]

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(1) [1891] A. C. 531, 580, 583.
(2) [1904] 2 Ch. 449, 454.
(3) [1905] 1 K. B. 804.
(4) [1916] 1 A. C. 242, 246.
(5) 1918 S. C. 158, 162.
(6) [1939] 1 K. B. 388, 391.
(7) [1941] A. C. 170.
(8) [1916] 1 A. C. 242, 251.

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(1) [1938] 1 K. B. 272.

(2) [1891] A. C. 382.

Counsel for the plaintiff were not called on to argue on the cross-appeal.

Cur. adv. vult.

Nov. 27. DU PARCQ L.J. read the judgment of the court. Without recapitulating the facts, we propose to state our reasons for deciding that this appeal should be allowed and the cross-appeal dismissed. With great respect to the learned judge, we think that he was wrong in his opinion that the two decisions, *Greenwood* v. *Atherton* (6) in this court and *Griffiths* v. *Smith* (7) in the House of Lords, supported his conclusion that the present action was barred by s. 21 of the Limitation Act, 1939. The managers of a non-provided voluntary school undoubtedly act " in pursuance of an Act of Parliament " and of " a public " duty " in the course of carrying on the management of that school. The governors of the school with which we are here concerned were in a very different position. They were administering a charitable trust, and the fact that it is in the public interest that they should do so does not make them a public authority or their work a " public duty " within s. 21 of the Limitation Act, 1939. It is, in our opinion, irrelevant for this purpose that persons holding official positions are ex-officio governors, and the fact that grants may in certain circumstances be made to the school out of public funds cannot convert the recipients into a public authority. The learned judge has, we think, misunderstood the words used by Goddard L.J. in *Greenwood* v. *Atherton* as to the receipt of a grant from public funds (8). The lord justice was dealing with the argument that the managers were not compellable to continue the performance of their duty and was pointing out that, while they continued to receive public funds (and so to act as managers under the statute), it could not be said that they were not still performing it. Read in their context, the words do not support the view of Hallett J.

(1) [1941] 2 K. B. 343.
(2) (1867) L. R. 2 C. P. 311.
(3) [1899] 1 Q. B. 986.
(4) [1915] 1 K. B. 584.
(5) [1942] A. C. 509.
(6) [1939] 1 K. B. 388.
(7) [1941] A. C. 170.
(8) [1939] 1 K. B. 393.

If the learned judge had not held that the plaintiff's claim was barred by the Limitation Act, 1939, he would have given judgment in his favour. The defendants have submitted that he would have been wrong so to decide. The judge held that it was the duty of the defendants "to make the premises "as safe for use by the scholars, in the ordinary way in which "scholars may be expected to use them, as reasonable care "and skill can make them." If that were indeed their duty, there is no doubt, we think, that they failed in it. It was submitted, however, that such a liability is imposed only where there is a contractual obligation and that the statement of claim alleged no contract. The cause of action, it was said, was laid in tort alone. The judge found authority for the view which he took of the defendants' duty in *Ching* v. *Surrey County Council* (1) and *Morris* v. *Carnarvon County Council* (2). We did not hear counsel for the plaintiff on this point, but we think that it might have been difficult for him to persuade us that those decisions were applicable to the present case. They both appear to us to have turned on the fact that the defendants then before the court were under a statutory duty to maintain the school premises in a proper condition, and there was no such statutory duty in the present case. It was rightly conceded, however, that the defendants were at least under the obligation which the law imposes on an invitor in respect of an invitee, and notwithstanding the forcible presentation of the case by counsel for the defendants, to which Mr. Dare made a valuable contribution, we are of opinion that, even on this view of the defendants' duty, they ought to have been held liable in the circumstances of this case. Their duty to their invitee was to use reasonable care to prevent damage of which they knew or ought to have known.

Two questions of fact arise. Did they use the reasonable care required? Ought they to have known of the danger which in fact existed? These questions of fact must be answered in the light of certain legal principles and of all the circumstances of the case. The defendants were governors of the school and it was inevitable that they should act through agents. They were bound to entrust to others the cleaning of the school premises, their upkeep from day to day, and the immediate supervision (so far as that was deemed necessary) of the work done in connexion with that cleaning and upkeep. The careful performance of these delegated duties was

(1) [1910] 1 K. B. 736.

(2) [1910] 1 K. B. 840.

necessary in order that the obligation to take reasonable care to prevent damage to invitees might be fulfilled. Cleaning must be done, and in some circumstances it has to be done carefully, if danger is to be avoided. When a step, truly described by the judge as "potentially dangerous," is covered with snow, the person entrusted with the duty of cleaning it must be careful not to leave it in a dangerous condition. If anyone has been appointed to supervise the work of the cleaner it is his duty to see that the work is carefully done. If no one has been appointed to supervise that work, then the invitors must be taken to have left the performance of the duty, for good or ill, to the cleaner. On the facts of this case we have no doubt that Mrs. Clark, who was admittedly negligent, had been entrusted by the defendants with the necessary work of cleaning the premises which they occupied. They had secured, by contract, the benefit of her services for that purpose. It may be, though we think it improbable, that the defendants expected the headmaster to supervise her work. If they did, he does not appear to have done what was expected of him. If they did not, then they left the care of the premises to Mrs. Clark. It is idle to suggest that Mrs. Clark was not authorized to brush snow from the step. It was clearly part of her duty to do so, and no one in her position would have been likely to omit that task. Negligence having been established against her, it follows that the defendants are responsible for their agent's failure to take reasonable care for the safety of their invitee. It does not avail them to say that they did not know of the danger. Of course, the defendants, who were many miles away, did not, and could not, know of it. Their agent, however, knew, or ought to have known, of it, whether we regard the headmaster as their agent to supervise the operation of cleaning or Mrs. Clark as their sole agent in the matter.

It is said by counsel for the defendants that Mrs. Clark was the servant, not of the defendants, but of the diaconate of the Congregational Church whose premises were occupied by the defendants. We do not accept this as the true view of her position. On the contrary, we think that it is a fair inference from the evidence that, at the material time, she was subject to the control of the defendants. We will, however, assume that the defendants are right on this point, for the purpose of examining their argument. If, said Mr. Dare, an occupier's servant negligently cleans his floor so that an invitee slips on it, the occupier is liable, but if (he said) the occupier has borrowed, or obtained by contract the services of, another man's servant, and that servant is guilty of similar negligence with similar consequences, then the occupier is not liable, though the servant's master may be. In our opinion, this is not the law. Even if Mrs. Clark was not temporarily under the control of the defendants and thus for the time being their servant, they are liable on the ground that they delegated to her the performance of the duty which was incumbent on them. If she is to be treated (as counsel submitted) as if she were an independent contractor, they are liable for her negligence on the ground stated in *Pickard* v. *Smith* (1), namely, that the "contractor" was intrusted with the performance of a duty incumbent on her employers, and neglected its fulfilment: see the judgment of Williams J. in that case (2) and the observations of Luxmoore L.J., in *Wilkinson* v. *Rea, Ld.* (3). On the assumption that Mrs. Clark or the diaconate of the church were in the position of independent contractors, Mr. Beney sought to rely on the decision of this court in *Haseldine* v. *C. A. Daw & Son, Ld.* (4). He relied on that case as authority for the proposition that an occupier is always absolved from responsibility to his invitee if he has entrusted work, the careful performance of which is necessary to their safety, to some competent person. That decision is no authority for so sweeping a proposition. What was there held is summed up in the following passage from the judgment of Scott L.J. (5) "The invitor is bound to take that "kind of care which a reasonably prudent man in his place "would take—neither more nor less. The landlord of a block "of flats, as occupier of the lifts, does not profess, as such, to "be either an electrical or, as in this case, a hydraulic "engineer. Having no technical skill he cannot rely on his "own judgment, and the duty of care towards his invitees "requires him to obtain and follow good technical advice. If "he did not do so, he would, indeed, be guilty of negligence. "To hold him responsible for the misdeeds of his independent "contractor would be to make him insure the safety of his "lift." "In the present case" the lord justice added "the "landlord was ignorant of the mechanics of his hydraulic "lifts and it was his duty to choose a good expert, to trust

(1) (1861) 10 C. B. N. S. 470.

(2) Ibid. 480.

(3) [1941] 1 K. B. 688, 702–3.

(4) [1941] 2 K. B. 343.

(5) Ibid. 356.

"him, and then to be guided by his advice." Such considerations as there influenced the court are not relevant to the present case. The craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands.

For these reasons, we are of opinion that the judge would have been right to give judgment for the plaintiff, as he would have done had he not come to an erroneous conclusion with regard to the plea of the statute. The appeal, accordingly, succeeds and the cross-appeal fails. The judgment for the defendants will be set aside, and a new trial ordered as to damages.

Appeal allowed: cross-appeal dismissed.

Solicitor for plaintiff: *F. Bernard Smith.*
Solicitors for defendants: *Gardiner & Co.*

C. G. M.

Ex parte HAINES.

1944
Oct. 13;
Dec. 18.
1945
Jan. 11.
Tucker J.

Emergency Legislation—Pension—Civil defence volunteer—War service injury—Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1—*Pensions (Mercantile Marine) Act,* 1942 (5 & 6 *Geo.* 6, *c.* 26), *s.* 5—*Personal Injuries (Civilians) Scheme,* 1944 (*St. R. & O.,* 1944, *No.* 369), *Part IV., art.* 12, *para.* 2 (*a*).

A "war service injury" for the purposes of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, and of Part IV., art. 12, para. 2 (*a*), of the Personal Injuries (Civilians) Scheme, 1944, does not include an injury which is purely mental in its character, but where physical harm or injury results from strain, exposure or shock without any trauma, it may constitute a physical injury and therefore a war service injury, provided that it has arisen out of and in the course of the performance by a civil defence volunteer of his duties as a member of a civil defence organization.

The applicant, Albert John Haines, a fireman in the National Fire Service, claimed that he was entitled to an award in respect of disablement caused by a "war injury" within the meaning of s. 8 of the Personal Injuries (Emergency Provisions)

Act, 1939 (1), or, alternatively, by a " war service injury " under art. 12, para. 2 (*a*) of Part IV. of the Personal Injuries (Civilians) Scheme made by the Minister of Pensions under ss. 1 and 2 of the above-named Act. The applicant's claim was rejected by the Minister of Pensions, and he appealed under the Pensions Appeal Tribunals Act, 1943. The appeal was heard on June 8, 1944, and the following facts were found by the Tribunal: The applicant was a fireman in the National Fire Service at Hove. In January, 1941, he was sent as a member of a relief crew to Gosport to deal with fires there during an enemy air raid, and remained on duty from Friday night until the following Monday afternoon. His work at Gosport was arduous and trying. Bombs were falling during the time he was there and he was unable to change his wet clothing during his period of service. The applicant was not injured by the discharge of any missile, nor was he struck by

(1) By Personal Injuries (Emergency Provisions) Act, 1939, s. 8, sub-s. 1: " In this Act, " unless the context otherwise " requires— . . . .' war injuries ' " means physical injuries— " (*a*) caused by—(i.) the discharge " of any missile (including liquids " and gas); or (ii.) the use of any " weapon, explosive or other nox-" ious thing; or (iii.) the doing of " any other injurious act; either " by the enemy or in combating " the enemy or in repelling an " imagined attack by the enemy; " or (*b*) caused by the impact on " any person or property of any " enemy aircraft, or any aircraft " belonging to, or held by any " person on behalf of or for the " benefit of His Majesty or any " allied power, or any part of, or " anything dropped from, any such " aircraft; ' war service injury ' " in relation to a civil defence " volunteer, means any physical " injury which the Minister certi-" fies to have been shown to his " satisfaction to have arisen out of " and in the course of the per-" formance by the volunteer of his " duties as a member of the civil " defence organisation to which he " belonged at the time when the " injury was sustained, and (ex-" cept in the case of a war injury) " not to have arisen out of and in " the course of his employment in " any other capacity."

By Pensions (Mercantile Marine) Act, 1942, s. 5: " For the removal " of any doubt it is hereby de-" clared that the expression " ' physical injury,' in the princi-" pal Act and in this Act, and in " the Personal Injuries (Emer-" gency Provisions) Act, 1939, " includes tuberculosis and any " other organic disease, and the " aggravation thereof."

By the Personal Injuries (Civilians) Scheme, 1944 (St. R. & O., 1944, No. 369), Part IV., art. 12, para. 2 (*a*) " ' disable-" ' ment,' in relation to a . . . . " civil defence volunteer who " has sustained a war service " injury, means physical or mental " injury or damage, or loss of " physical or mental capacity, " caused by that injury, and " ' disabled ' shall be construed " accordingly."

any part of a missile or falling debris, or by blast from an exploding bomb, or knocked over or cut, and did not receive any abrasion. He did not report that he was suffering from any disability until September, 1941, when he was certified to be suffering from nervous debility. He was of a nervous disposition before he joined the National Fire Service and his experience at Gosport aggravated that condition. The nervous debility from which he suffered was due to, or aggravated by, his service in the National Fire Service at Gosport. It was a functional or emotional disorder, and not an organic disease, and was not caused by trauma.

The tribunal was of opinion: (1.) that the applicant's disablement was not a war injury within the meaning of s. 8, sub-s. 1, of the Personal Injuries (Emergency Provisions) Act, 1939, since it was not the result of any of the matters therein set out: (2.) that it was not the result of a "war "service injury" within the meaning of the above section of the Act of 1939, as extended by s. 5 of the Pensions (Mercantile Marine) Act, 1942, since nervous debility was a functional, emotional disorder and not an organic disease; (3.) that to constitute a war service injury within the meaning of s. 8 of the Act of 1939, and of art. 12, para. 2 (*a*) of the Personal Injuries (Civilians) Scheme, 1944, the claimant must have received a trauma, resulting in physical or mental injury or loss of mental capacity; and that having failed to satisfy the first of these conditions the applicant could not bring himself within the terms of the definition. The tribunal accordingly dismissed the appeal. The applicant appealed.

Everett for the applicant.
Valentine Holmes for the Minister of Pensions.

Cur adv. vult.

Jan. 11, 1945. TUCKER J. read the following judgment, in which he stated the facts and continued: The applicant has contended that he was entitled to an award in respect of disablement caused by a war injury, or, alternatively, a war service injury under Part IV. of the Personal Injuries (Civilians) Scheme, made by the Minister of Pensions under ss. 1 and 2 of the Personal Injuries (Emergency Provisions) Act, 1939. "War Injuries" is defined in s. 8 of the Personal Injuries (Emergency Provisions) Act, 1939, as "physical injuries " caused by certain specific matters therein enumerated. The tribunal has stated in the case that it finds that the applicant's injury was not the result of any of the matters set out in that definition. This finding disposes of the claim for an award in respect of disablement caused by a war injury, and I do not refer further to this aspect of the case.

The tribunal also disallowed the applicant's appeal in respect of the Minister's rejection of his claim for an award for disablement caused by " war service injury." [His Lordship then read the material sections of the Acts of 1939 and 1942, and art. 12 of the Personal Injuries (Civilians) Scheme, and continued :] From the definition of " disablement " in the scheme, it will be observed that the physical or mental injury or damage, or loss of physical or mental capacity, must have been caused by a " war service injury." Under the relevant section of the Act a " war service injury " must be a physical injury. It is accordingly contended by the Minister, and the tribunal has so held, that the injury must be traumatic in origin, or an organic disease, to justify a disablement award. In this case it is found that the disability is a functional or emotional disorder not caused by trauma. The question of law for my determination is whether the tribunal has correctly interpreted the words " physical injury " in the Act.

Mr. Holmes, on behalf of the Minister, submits that the words " physical injury " have been deliberately used, so as to exclude " mental injury," and that physical injury, other than organic disease, connotes something traumatic in origin. Mr. Everett, for the applicant, contends that there is no scientific distinction between mental and physical, and that in any event there may be physical injury without any originating trauma. In considering these contentions it is, I think, proper to look at the circumstances in which the Act was passed and its place in the general pensions framework. The title of the Act contains the words " personal injuries," and the preamble describes it as an Act to make provision as respects " certain " personal injuries." In the body of the Act itself we find that the " certain personal injuries " are " physical injuries " arising in certain specified circumstances, which are called " war injuries " and " war service injuries." This language may, I think, be contrasted with that used in the Royal Warrants, Orders in Council, and Orders dealing with the armed forces, where the words " disablement due to a wound, " injury or disease attributable to war service " occur. Then again the definition of "war service injury" is obviously framed in language taken from the Workmen's Compensation Acts, with certain significant alterations. This is natural, having regard to the special provisions in the Personal Injuries (Emergency Provisions) Act, 1939, whereby persons who have suffered war service injuries are deprived of their right to claim workmen's compensation. The explanation of the words "physical injury" in s. 5 of the Pensions (Mercantile Marine) Act, 1942, whereby those words must be read as including "tuberculosis and any other organic disease, and the aggravation thereof," indicates in my view that the draftsman had in mind the problems that had arisen in the early days of the Workmen's Compensation Act in construing the words "personal injury by accident." Further, I think it is permissible to bear in mind that at the date of the passing of the Pensions (Mercantile Marine) Act, 1942, there was in existence a "scheme" made by the Minister under the powers conferred on him by the Personal Injuries (Emergency Provisions) Act, 1939, in which he had used language drawing a clear distinction between mental and physical injuries.

I find, therefore, that the legislature, which must be taken to have been aware of the matters referred to above, has deliberately rejected the phrase "personal injury" used in the Workmen's Compensation Acts, and in the preamble to the Act of 1939, and has also refrained from adopting the language of the royal warrants and orders, and has instead used the words "physical injury." By so doing it has, I think, purposely excluded injuries which are purely mental. This distinction may not be entirely in accordance with the most modern scientific views, but it is one which has been very generally recognized in medical and legal language, though it has not escaped criticism. For a recent legal example of the recognition of the distinction see the speeches of their Lordships in *Hay or Bourhill* v. *Young* (1). I have arrived at the conclusion that the words "physical injury" do not include injuries which are purely mental. The distinction in each case is, of course, one of fact and the decision may often be difficult.

This does not, however, conclude this appeal, because the tribunal has not, as I understand its decision, based itself on a finding that the applicant's injury is purely mental. The appeal has been rejected on the ground that the injury, admittedly not being an organic disease, had no traumatic origin. This appears to me to be importing something into the words " physical injury " which is not to be found in the Act or in the explanation contained in s. 5 of the Pensions (Mercantile Marine) Act, 1942. I apprehend that a man may suffer serious physical harm or injury, for example, from strain, exposure or shock, without any trauma. To adopt the language of Lord Halsbury in one of the Workmen's Compensation Act cases which seems to me to be applicable here, any " injurious affection of the physical frame " is a physical injury within the meaning of a war service injury in this Act, provided it has arisen out of and in the course of the performance by the volunteer of his duties as a member of a civil defence organisation.

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(1) [1943] A. C. 92.

I hope and believe the views I have expressed above are not at variance with the dicta of Lord Moncrieff in the case of *M'Clory* v. *Donaldson Atlantic Line, Ld.* (1) in which case, however, there was on the facts a clear trauma and the court had not had the benefit of any argument on behalf of the Minister of Pensions. On the facts set out in this case I am in some doubt whether the tribunal has found that the injury which caused the disablement was purely mental or whether it was wholly or partly physical, due to some such cause as strain, exposure or shock.

I think, therefore, that the better course is to remit the case for the further consideration of the tribunal in the light of this judgment.

Case remitted.

Solicitor for applicant : *W. H. Thompson.*
Solicitor for Ministry of Pensions : *Treasury Solicitor.*

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(1) (1943) 36 B. W. C. C. 1943, Supp. 62.

P. B. D.

ALDERSLADE *v.* HENDON LAUNDRY, LIMITED.

C. A.

1945
Jan. 22, 23, 24.

Lord Greene M.R.
MacKinnon L.J. and Uthwatt J.

Applied. CANADA STEAMSHIP LINES *v.* THE KING [1952] A.C. 192

Contract—Articles sent to be laundered for reward—Articles lost—Negligence—Condition limiting liability.

Articles were sent by the plaintiff to the defendants' laundry to be washed and were lost. In an action by the plaintiff against the defendants for damages the defendants relied on the following condition to limit their liability: "The maximum amount allowed "for lost or damaged articles is twenty times the charge made for "laundering":—

Held, that as no liability could arise for loss of articles except through the defendants' negligence, the condition applied to limit their liability in cases of negligence and applied, therefore, to limit the plaintiff's damages.

In a case where loss might arise from causes other than negligence, such a condition would not apply to limit liability for loss through negligence, unless it was expressly made applicable in clear terms.

APPEAL from Willesden county court.

In September, 1943, the plaintiff, Mr. A. E. Alderslade, left ten large Irish linen handkerchiefs with the defendants, Hendon Laundry, Ld., to be washed. The defendants having failed to return the handkerchiefs, the plaintiff, who had been compelled to buy ten similar handkerchiefs for 2*l.* 1*s.* 5*d.*, and to use for the purpose five clothing coupons, brought proceedings in the Willesden county court for the sum of 2*l.* 1*s.* 5*d.* and damages in respect of the five coupons, but limited his claim to 5*l.* In defence the defendants relied on the conditions on which the the handkerchiefs were accepted, including condition 3: "The maximum amount allowed for "lost or damaged articles is 20 times the charge made for "laundering." This sum was 11*s.* 5½*d.*, which the defendants had previously tendered to the plaintiff, who had refused it. It was then paid into court. It was agreed that the handkerchiefs were sent to the laundry but not returned, and that they could not be found.

The county court judge gave judgment for the plaintiff for 5*l.*, and said prima facie the plaintiff was entitled to succeed as he proved delivery of the articles to be laundered for reward and the defendants on demand had failed to return them. The defendants relied on the condition, of which the plaintiff through his agent, his wife, was aware. The plaintiff had laid the foundation of a negligent carrying on of their business by the defendants by proving other acts of negligence.

To cover a loss due to a negligent method of conducting business the condition needed to be worded more clearly, so that the customer should have no doubt as to where he stood. The defendants appealed.

Heathcote-Williams for the defendants. As a laundry company the defendants are only liable for negligence. They are bailees of articles sent to them to be washed, and while a common carrier is liable for all the acts of his servants, whether negligent or not, a bailee is only liable for his servants' negligence: *Rutter* v. *Palmer* (1). The rule is that a protective clause applying to a number of different liabilities is too wide and does not apply in case of negligence, but that if the only liability that can arise will be through negligence, the protective clause will apply. It is not necessary to limit the liability expressly to cases of negligence, if in fact no other form of liability can arise: *Turner* v. *Civil Service Supply Association, Ld.* (2), *Fagan* v. *Green & Edwards, Ld.* (3). The county court judge has failed to distinguish between the position of a bailee and a common carrier. In the present case there can be no liability for loss or damage except because of negligence. The defendants as bailees only have to use reasonable care. Therefore the condition applies to restrict the defendants' liability. It is not like a case where it can be said that the defendants have gone outside their contract, when different conditions would apply: *Bontex Knitting Works, Ld.* v. *St. John's Garage* (4). He also referred to *Price & Co.* v. *Union Lighterage Co.* (5) and *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (6). It was admitted here that the plaintiff's handkerchiefs could not be found and apart from surmise there was nothing to take what had happened to the handkerchiefs while in the defendants' hands out of the contract.

H. Lester for the plaintiff. The condition is not restricted to loss or damage by negligence. It is in language prepared and put forward by the defendants, and must be construed against the defendants. The condition is therefore too wide and will not be applied. The defendants are not mere bailees. They are under contract to launder, and a liability might arise through failure to do that in a proper expert way, quite

(1) [1922] 2 K. B. 87.
(2) [1926] 1 K. B. 50, 58.
(3) [1926] 1 K. B. 102, 108.
(4) (1944) 60 T. L. R. 253.
(5) [1904] 1 K. B. 412.
(6) [1908] 2 K. B. 626.

apart from negligence. Further, the collection and delivery of the goods are part of the contract. There is evidence of wrong delivery on more than one previous occasion. There may be negligence in the performance of a contract or negligence by doing something entirely outside the contract. Here the only admission is that the handkerchiefs cannot be found, and the burden is on the defendants to show that the loss is due to negligence within the contract.

Heathcote-Williams replied and referred to *J. F. Shaw & Co., Ld.* v. *Symmonds & Sons, Ld.* (1).

[LORD GREENE M.R. referred to notes to *Coggs* v. *Bernard* (2).]

LORD GREENE M.R. The terms on which the defendants, the laundry company, accepted their customer's goods included a clause in the following terms: "The maximum amount "allowed for lost or damaged articles is twenty times the charge "made for laundering." The defendants relied on that clause for the purpose of limiting their liability to the plaintiff in respect of certain handkerchiefs which he had sent to be laundered but which were not returned to him. It was admitted at the hearing that the handkerchiefs were sent, were not returned, and cannot now be found. That last admission seems to me to be capable of one construction only, namely, that the handkerchiefs are lost. By admitting that they cannot be found the plaintiff must I think be taken to have admitted that the defendants had taken all reasonable steps to trace them. The case must, therefore, be approached on that footing. The learned county court judge considered that the defendants had a negligent manner of carrying on their business, relying on certain evidence given by the plaintiff which showed that he had on occasions received from them articles of clothing which did not belong to him, and that on one occasion when they were informed of this they made no attempt to recover the article from him with a view to returning it to its true owner. On that footing the learned judge considered that this clause limiting liability did not apply.

It was argued before us for the defendants that the clause did apply and was effective to limit liability for lost articles; and reliance was placed on a well-known line of authority dealing

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(1) (1917) 33 T. L. R. 239.
(2) (1703) 1 Sm. L. C., 13th ed., 175, 208.

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with clauses of this description. The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence. A common illustration of the principle is to be found in the case of common carriers. A common carrier is frequently described, though perhaps not quite accurately, as an insurer, and his liability in respect of articles entrusted to him is not necessarily based on negligence. Accordingly if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit it in respect of his liability for negligence, then the clause will be construed as extending only to his liability on grounds other than negligence. If, on the other hand, a carrier not being a common carrier, makes use of such a clause, then unless it is construed so as to cover the case of negligence there would be no content for it at all seeing that his only obligation is to take reasonable care. That, broadly speaking, is the principle which falls to be applied in this case.

I do not propose to go through the various authorities to which we have been referred, but I may mention *Rutter* v. *Palmer* (1), *Turner* v. *Civil Service Supply Association* (2), and *Fagan* v. *Green & Edwards, Ld.* (3). There are, of course, many others to the same effect. It must be remembered that a limitation clause of this kind only applies where the damage, in respect of which the limitation clause is operative, takes place within the four corners of the contract. But there is no room for the application of that principle in the present case, because there is no material for finding that the loss of these handkerchiefs was due to some act by the defendants outside what they had contracted to do.

(1) [1922] 2 K. B. 87.
(2) [1926] 1 K. B. 50.
(3) [1926] 1 K. B. 102.

It was argued by counsel for the plaintiff that the clause must be construed in the present case so as to exclude loss by negligence, and the learned county court judge so held. It was said that the loss of a customer's property might take place for one of two reasons, namely, negligence and mere breach of contract, and that in the absence of clear words referring to negligence, loss through negligence cannot be taken to be covered by the clause. In my opinion that argument fails. It is necessary to analyse the legal relationship between the customer and the defendants. What I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation of the defendants to launder. That is the primary obligation. It is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it. The defendants undertake, not to exercise due care in laundering the customer's goods, but to launder them, and if they fail to launder them it is no use their saying, "We did our best, we exercised due care "and took reasonable precautions, and we are very sorry if "as a result the linen is not properly laundered." That is the essence of the contract, and in addition there are certain ancillary obligations into which the defendants enter if they accept goods from a customer to be laundered. The first relates to the safe custody of the goods while they are in the possession of the defendants. The customer's goods may have to wait for a time in the laundry premises to be washed, and while they are so waiting there is an obligation to take care of them, but it is in my opinion not the obligation of an insurer but the obligation to take reasonable care for the protection of the goods. If while they are waiting to be washed in the laundry a thief, through no fault of the defendants, steals them, the defendants are not liable. The only way in which the defendants could be made liable for the loss of articles awaiting their turn to be washed would, I think, quite clearly be if it could be shown that they had been guilty of negligence in performing their duty to take care of the goods. That is one ancillary obligation which is inherent in a contract of this kind. Another relates to the delivery of the goods. The laundry company in most cases, and indeed in this case, make a practice of delivering the goods to the customer, and in the ordinary way the customer expects to receive that service. But what is the precise obligation of the laundry in respect of the return of the goods after the laundering has been completed? In my opinion it stands on the same footing as the other ancillary obligation that I have mentioned, namely, the obligation to take reasonable care in looking after and safeguarding the goods. It cannot I think be suggested that the obligation of the laundry company in the matter of returning the goods after they have been laundered is the obligation of an insurer. To say that they have undertaken by contract an absolute obligation to see that they are returned seems to me to go against common sense. Supposing the defendants are returning the goods by van to their customer and while the van is on its way a negligent driver of a lorry drives into it and overturns it with the result that it is set on fire and the goods destroyed. No action would lie by the customer for damages for the loss of those goods any more than it would lie against any ordinary transport undertaking which was not a common carrier. To hold otherwise would mean that in respect of that clearly ancillary service the defendants were undertaking an absolute obligation that the goods would, whatever happened, be returned to the customer. It seems to me that the only obligation on the defendants in the matter of returning the goods is to take reasonable care.

In the present case all that we know about the goods is that they are lost. There seems to me to be no case of lost goods in respect of which it would be necessary to limit liability, unless it be a case where the goods are lost by negligence. Goods sent to the laundry will not be lost in the act of washing them. On the other hand, they may be lost while they are in the custody of the defendants before washing or after washing has been completed. They may be lost in the process of returning them to the customer after they have been washed, but in each of those two cases, if my view is right, the obligation of the defendants is an obligation to take reasonable care and nothing else. Therefore, the claim of a customer that the defendants are liable to him in respect of articles that have been lost must, I think, depend on the issue of due care on their part. If that be right, to construe this clause, so far as it relates to loss, in such a way as to exclude loss occasioned by lack of proper care, would be to leave the clause so far as loss is concerned—I say nothing about damage—without any content at all. The result is in my opinion is that the clause must be construed as applying to the case of loss through negligence. Therefore this appeal succeeds, and the appropriate reduction in damages must be made in the order.

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I may add that I have the authority of Uthwatt J. to say that he agrees with my conclusion and the reasons I have given for it.

MacKinnon L.J.: I agree. Reliance on cases between shipowners and owners of goods is illusory. It has been held in them that to relieve himself of liability for negligence a shipowner must express that in clear terms. But a shipowner, if he has no contract with the owner of the goods, is liable for loss from any cause other than the act of God and the King's enemies. In the case of a bailment, where the bailee is liable only for loss or damage by reason of negligence, the position is very different. The rule or principle is very admirably stated by Scrutton L.J. in a short passage in *Rutter* v. *Palmer* (1): "In construing an exemption clause certain "general rules may be applied: First, the defendant is not "exempted from liability for the negligence of his servants "unless adequate words are used; secondly, the liability of "the defendant apart from the exempting words must be "ascertained; then the particular clause in question must be "considered; and if the only liability of the party pleading "the exemption is a liability for negligence, the clause will "more readily operate to exempt him." Applying that principle to the facts of this case, I think that the clause in question does avail to protect the proprietors of the laundry in respect of liability for negligence, which must be assumed to be the cause of these handkerchiefs having disappeared. In the result, I agree that the appeal must succeed.

Appeal allowed.

Solicitors: *H. R. Hodder & Son; Rayner, Hudson & Co.*

H. C. G.

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(1) [1922] 2 K. B. 87, 92.

C. A.

1945

Jan. 31; Feb. 1.

Lord Greene M.R., MacKinnon L.J. and Uthwatt J.

UPPER AGBRIGG ASSESSMENT COMMITTEE AND OTHERS *v.* BENTS BREWERY COMPANY, LIMITED (1).

Rates—Valuation—Proposal for amendment—Service of copy of proposal—Wrong service on owners of hereditament—Objection and subsequent appeal by owners—Jurisdiction—Rating and Valuation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 90), *s.* 37, *sub-ss.* 3, 4 *and* 7.

A rating authority made a proposal for the amendment of the valuation list in respect of hereditaments belonging to a brewery company by increasing the gross and rateable values. The rating authority sent a copy of the proposal to the occupier of the premises and a copy also to the owners. No objection to the proposal was made by the occupier, but an objection in writing was made by the owners, who appeared before the assessment committee without objection. On the proposal being allowed the owners appealed to quarter sessions, when it was held on a preliminary point that the owners had no locus standi, since they were not persons to whom under s. 37, sub-s. 3, of the Rating and Valuation Act, 1925, a copy of the proposal ought to have been transmitted. On appeal from the Divisional Court, which had reversed this decision :—

Held, that as under sub-s. 3, service of a copy of the proposal ought not to have been served on the owners, the assessment committee had no jurisdiction to hear their objection to the proposal and quarter sessions had no jurisdiction to hear their appeal from the assessment committee's decision. It is impossible for one or both of the parties to confer on a tribunal a jurisdiction not given to it by the legislature. The provision in s. 37, sub-s. 7, that " all the foregoing provisions of this Part of this Act relating " to the hearing and determining of such objections shall apply " accordingly " has no bearing on the question of parties but only makes the procedure to be followed by the assessment committee in regard to objections to proposals properly taken the same as that followed in hearing objections to the draft quinquennial valuation.

Decision of the Divisional Court [1944] K. B. 524 reversed on this point.

APPEAL from the Divisional Court (2).

By a proposal, dated September 30, 1942, the Upper Agbrigg Assessment Committee (hereafter called the Assessment

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(1) This case (reported before the Divisional Court as *Bents Brewery Co., Ld.* v. *Upper Agbrigg Assessment Committee*), was listed in the Court of Appeal as *Upper Agbrigg, &c.* v. *Gartsides* (*Brookside Brewery*), *Ld.* Gartsides (Brookside Brewery), Ld., was a subsidiary of Bents Brewery Co., Ld., and the latter company only were the owners of the property being assessed for rates.

(2) [1944] K. B. 524.

Committee), as the rating authority for Saddleworth Urban District, Yorkshire, proposed that Part I of the valuation list for that area should be amended by increasing the gross and rateable value of the licensed premises, Clarence Hotel, Greenfield, belonging to Bents Brewery Co., Ld., from 85*l.* and 68*l.* to 95*l.* and 76*l.* A copy of the proposal was sent to the occupier of the premises, Alfred Jenkinson, and also, it was stated, as a matter of courtesy, to the owners, addressed as " Messrs. Bents " Brewery Co., Ld., c/o Messrs. Gartsides Brewery Co., Ld., " Brookside Brewery, Ashton-under-Lyme." In the proposal " annual revision " was given as the ground upon which the assessment was supported. The occupier gave no notice of objection to the proposal but a notice of objection was given by Bents and by Gartsides (Brookside Brewery), Ld. (hereafter called Gartsides), the latter company being a subsidiary of the former company. The assessment committee considered the proposal and objections on February 23, 1943, allowed the proposal, and amended the valuation list accordingly. On appeal by Bents and Gartsides, as persons aggrieved, the assessment committee and the county valuation committee of the West Riding of Yorkshire, as the respondents, submitted as a preliminary objection that neither Bents nor Gartsides had a right of appeal to quarter sessions under the Rating and Valuation Act, 1925 (1). The court of quarter sessions held that s. 37 of the Act imposed a duty to transmit a copy of the proposal to the occupier ; and to the owners, if, and only if, there was no occupier. They therefore allowed the preliminary objection and dismissed the appeal. By consent they also heard the appeal on its merits in case the High Court considered their

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(1) By the Rating and Valuation Act, 1925, s. 37, sub-s. 3 : " The rating authority shall, within seven days after the date on " which the proposal is made by " or served on them, transmit a " copy thereof, in the case of a " proposal made otherwise than by " the occupier of the hereditament " to which it relates, to the occupier, or, when there is no " occupier, to the owner thereof " . . . ."

Sub-section 4 : " Any person to " whom a copy of the proposal is " transmitted as aforesaid may, if " he thinks fit, give to the rating " authority notice in writing of " objection to the proposal and " unless he gives such notice he " shall not be entitled to be heard " at the meeting in opposition to " the proposal . . . ."

Sub-section 7 : " The assessment " committee shall hear and determine any proposal as if it were " an objection to a draft list, and " all the foregoing provisions of " this Part of this Act relating to " the hearing and determining of " such an objection shall apply " accordingly."

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decision to be erroneous and they decided that the proposal was not a valid proposal. Both sides appealed and a special case was submitted to the High Court for decision. The Divisional Court (Humphreys, Croom-Johnson and Stable JJ.) held that, as the objection to the proposal by the owners, and their appearance before the assessment committee, were attributable to the act of the rating authority in sending them a notice of the proposal, the assessment committee and the county valuation committee could not be heard to say that the assessment committee had no jurisdiction to entertain the objection or that the owners had no right of appeal. They also held that "annual revision" was not a ground for supporting the proposal within s. 37, sub-s. 2 (*b*), of the Act and that the proceedings were defective from the beginning. The assessment committee and the county valuation committee (hereafter called the appellants) appealed.

The only question argued on the appeal went to the jurisdiction and whether Bents Brewery had any locus standi.

Streatfeild K.C. and *M. Archibald* for the appellants. In considering the jurisdiction of any tribunal it is impossible to treat it as having been conferred by the person objecting having been wrongly served, as Bents were in this case. That this is really a question going to jurisdiction is made clear by *Rex* v. *West Derby Area Assessment Committee* (1). The only question in the present case is whether the owners were legally entitled to receive a copy of the proposal. That is made clear by s. 37, sub-s. 3, which provides that a copy is to be transmitted to the occupier, and only when there is no occupier to the owner of the hereditament to which it relates. Further, s. 37, sub-s. 4, in providing that "any person to whom a copy of the proposal "is transmitted" may give notice in writing of objection, must be taken to mean any person to whom a copy of the proposal is properly transmitted under sub-s. 3. Although, therefore, the owners appeared before the assessment committee, they were not properly there, and there was no jurisdiction to hear their objection. So, too, s. 37, sub-s. 8, gives a power to appeal as a person "aggrieved by the decision of "the assessment committee" only to the person who lawfully objects to a proposal. Jurisdiction goes right through the substance of the matter and mistake cannot create jurisdiction when none would otherwise exist.

(1) [1939] 1 K. B. 173.

Comyns Carr K.C. and *Harold B. Williams* for Bents and Gartsides Breweries. Proceedings before an assessment committee are not to be treated technically or strictly in the matter of procedure: *Gateshead Union Assessment Committee* v. *Redheugh Colliery, Ld.* (1). [Lord Greene M.R. That only means that in proceedings properly constituted there need be no formality.]

Bents must be taken to have given notice here of objection, although owing to the form of the proposal they erroneously described themselves as acting for Gartsides. In any case the person served is not the only person that can object. Any person interested, though without service, is entitled to appear before the assessment committee and object. That is the case in regard to the quinquennial valuation, which owing to postponement by statute has not taken place since 1934. That leaves the scheme of alteration under s. 37 alone available, and sub-s. 7, in dealing with the hearing and determination of a proposal by the assessment committee provides: " and all the " foregoing provisions of this Part of this Act relating to the " hearing and determining of such an objection shall apply " accordingly." This has the effect of incorporating ss. 26, 27 and 31, and results in there being the same right to object to a proposal under s. 37 as there is in regard to a quinquennial valuation: see in particular the proviso to s. 27, sub-s. 1.

[Uthwatt J. Section 37, sub-s. 7, only applies the procedure in regard to hearing and determining in use in regard to quinquennial valuations.]

Section 27 deals precisely with hearing and determining, and the fact that there might in any case be a conflict of view between owner and occupier is a ground for saying that the owner would not be completely excluded from taking an objection. The right of objection under s. 37 is additional to the rights given by s. 27. Further, anyone served with a copy of a proposal would be entitled to assume that he was properly served and therefore had the right of objection and afterwards of appeal.

Streatfeild K.C. replied.

Lord Greene M.R. (stated the facts and continued): I do not think I am misconstruing the judgment of the Divisional Court if I say that, fundamentally, it is based on the conception that the present appellants had somehow, by their

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(1) [1925] A. C. 309.

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conduct, conferred on the assessment committee, and thereby on quarter sessions on appeal, jurisdiction which, by law, they did not have. With great respect, it is impossible for one or both of the parties to confer on a tribunal a jurisdiction which the legislature has not chosen to give to it. No question of estoppel, or anything of that kind, can come into the matter. A matter heard by a tribunal in excess of its jurisdiction is heard coram non judice. This is, perhaps, an extreme case in this sense: the point of jurisdiction could have been taken before the assessment committee, but it was only taken when the matter reached quarter sessions. In my opinion that is immaterial. If the assessment committee had no jurisdiction, quarter sessions had no jurisdiction. The sole question for quarter sessions was whether or not they had jurisdiction, and they had to decide for themselves whether they had or had not jurisdiction. No action of the parties at the hearing before the assessment committee could possibly have conferred on quarter sessions jurisdiction to hear something which they had no jurisdiction to hear. I think that is all I need say on that aspect of the matter, except that an objection to the jurisdiction of the court is one which the court itself is bound to take, providing its attention is called to it. As soon as the court sees that the matter which it is being asked to entertain is something in excess of its jurisdiction, it is bound to take the point. No conduct and no consent can relieve it of that duty. It is right to say that Mr. Comyns Carr in his argument did not seek to support his case on the grounds which appear in the judgment of the Divisional Court. His argument was different.

I now turn to the substantial question, which is whether or not jurisdiction existed. The proposal was made under s. 37 of the Rating and Valuation Act, 1925, sub-s. 3 of which requires the rating authority, if it makes the proposal, as it did in this case, to transmit a copy to the occupier of the hereditament, or, where there is no occupier, "to the owner "thereof." In the present case, a copy was sent to the occupier Jenkinson. It is only where there is no occupier that a copy is to be sent to the owner. Therefore, the sending of the copy to Bents in the present case was something which the sub-section does not require. Sub-section 4 makes it clear that only a person who has given notice of objection is entitled to be heard. The really controversial point on this branch of the argument is whether the words "any person to whom a "copy of a proposal is transmitted as aforesaid" means "any person to whom a copy of a proposal is transmitted in "fact," or "any person entitled to a copy who has such copy "transmitted to him?" The words "as aforesaid" must refer back to the directions in sub-s. 3 as to the serving of copies. Those directions are to serve a copy on the occupier, and only if there is not an occupier to serve a copy on the owner. Therefore, sub-s. 4 appears to me to refer only to the case of the person who has properly been served with a copy of the proposal pursuant to sub-s. 3, and where there is an occupier, that excludes the owner.

A separate point arises on sub-s. 7 with which I shall deal later.

Sub-section 8 provides: "If the person by whom any "proposal is made under this section, or a person who objects to "any such proposal, or the rating authority is aggrieved by "the decision of the assessment committee," he may appeal, "and subject to the express provisions of this section all the "provisions of this Part of this Act with respect to appeals "against such a decision shall apply accordingly." Something turns on the meaning of the words "a person who objects to "any such proposal." Those words in this context appear to me not to extend to any person not already mentioned as having the right of objection to the proposal. They refer only to persons who, pursuant to the other provisions in the section, are entitled to object to a proposal. A section giving a right of objection to specified persons cannot be extended by words such as these in a later sub-section. The words must be read so as to harmonize with the governing part of the section, which sets out quite clearly the persons who are entitled to object. They must be read, therefore, as "a person who, being entitled "to object pursuant to the provisions of this section, in fact "objects." There is a phrase in sub-s. 10 which seems to me to confirm what I have just said. I do not read the sub-section but it uses the phrase: "where notice of the proposal was given "to the occupier or owner, as the case may be, of the heredita-"ment affected": quite clearly confirming the view that, if there is an occupier, the owner does not come into the picture at all.

Mr. Comyns Carr, on this part of his argument, maintained that, providing a person is in fact served with a notice, he is entitled to put in an objection and having done so, to appear and argue his objection and, if he so pleases, to appeal to quarter sessions, although he was served by mistake. In my opinion it is impossible to get that construction out of the language of the Act. If the rating authority by mistake only serves a person who is not an occupier, then the proceedings before it are abortive, because the necessary preliminary of serving the occupier has not been fulfilled. In the present case everything was done in order, for Jenkinson, the occupier, was served. The rating authority knew Jenkinson was the occupier and they served him, but they also served the owner. The fact that they served the owner cannot make him a person " to whom a copy " of a proposal is transmitted as aforesaid," for the simple reason that, where there is an occupier, there is no question of serving a notice on the owner. In my opinion that is the short answer to the argument on that part of the case.

Mr. Comyns Carr's main argument is that the provisions of some earlier sections are imported into s. 37 by reason of what is said in sub-s. 7 in regard to the procedure of the assessment committee. These earlier sections—Mr. Carr refers in particular to s. 27 and the proviso to it—relate to the proceedings in the case of the ordinary quinquennial valuation. The procedure with which we are concerned is what I may describe as the intermediate procedure for making corrections or alterations in the list during the five-year period during which the quinquennial list is current. For the time being, the quinquennial valuation has been suspended, with the result that alterations made by means of this procedure under s. 37 have a permanency, which, in ordinary times, they would not have. In ordinary times, the whole matter would speedily have come up again, and anybody concerned could have objected when the new draft quinquennial list had been prepared. Mr. Comyns Carr says that all the procedure which is relevant and appropriate to objections in respect of the draft valuation list applies to the procedure under s. 37 for revision by means of a proposal, and that the additional procedure for the purposes of s. 37 is superimposed on the normal procedure in connexion with the quinquennial valuation. He says the result is that any person so minded can refrain from observing the special procedure laid down by s. 37, and can rely on the procedure laid down for the quinquennial valuation and that, consequently, an occupier who has been served with a proposal need not trouble to give notice of objection because he is entitled, as on a quinquennial valuation, to appear, whether he has given notice of objection or not.

I find it impossible to construe the language of the section in that way. It seems to me that s. 37 lays down a special code for the case of revision by a proposal, one of the express terms of which is that a person to whom a copy of a proposal is transmitted, unless he gives notice of objection, shall not be entitled to be heard. It is impossible, by referential words, importing for certain procedural purposes the procedure in the case of draft lists, to override the clear and specific prohibition which the legislature has laid down in s. 37, sub-s. 4. Under the provisions with regard to the quinquennial valuation, the proceedings are open to all the world in the sense that all are given an opportunity, if interested, of examining the draft and taking objection to it, but it seems to me that in s. 37 the legislature is dealing with an interim matter which will be open to further discussion at the end of the quinquennial period. It has therefore limited the persons who are to be entitled to take part in the proceedings to the specific persons mentioned in the section. Having done that, it proceeds to provide for the procedure which is to be adopted, and it does that by using the phrase which I have mentioned in sub-s. 7, importing the provisions of the earlier sections relating to the "hearing and "determining" of an objection to the draft list. The proposal is to be treated for that purpose as if it were an objection to the draft list. It seems to me that that has nothing to do with parties. It is the provisions relating to hearing and determining which are imported and nothing else.

There is one more general criticism of Mr. Comyns Carr's argument. If the legislature had indeed given to a wider class of person the right to object to a proposal, it could only be because the legislature thought it just. But it seems to me to be quite impossible that the legislature should regard any person as having a title to object, without at the same time providing for his receiving notice of the proposals to which he may object. In the case of the draft list for the quinquennial valuation, anybody, if he takes the trouble, can find out whether he is affected by what it is proposed to do, but under s. 37 nobody but the occupier, or, if there be no occupier, the owner, ever hears of a proposal by the rating authority. There are no provisions for publicity or for serving notice, save on that one person. According to Mr. Comyns Carr, the legislature seriously said to itself that, if anybody happened to hear by accident of a proposal which he thought concerned him, he would have a locus standi to appear and object, whereas his next-door neighbour, who had an equally good ground to object, and did not have the good luck to hear of the proposal, would be shut out. It would require the clearest and most explicit language to produce such a result. Sub-section 7 certainly does not do so. It is suggested that the result is produced by the proviso to s. 27, sub-s. 1. That sub-section provides that the assessment committee " shall hold meetings " for considering any objections made to the draft list." The proviso is " Provided that the assessment committee " may at any such meeting consider any objection, although " notice thereof has not been given in accordance with this " Act, if the persons to whom copies of the notice of objection " are required by this Act to be given, consent to the con- " sideration of the objection." It seems to me either that this proviso cannot be imported by sub-s. 7 of s. 37, or, if it is to be imported, that it does not assist the argument, because it could only be imported by re-writing it with the substitution of " proposal " for " objection." If that alteration is to be made all the other alterations in the language of the proviso which are consequential on it must also be made. If that is done, it seems to me that the result quite clearly affords no support to the argument.

In my opinion, s. 37 does not confer any right to appear on a person who has wrongly received a notice, and a person who has wrongly received a notice gains no assistance from the earlier sections of the Act, because those sections are not imported in such a way as to increase the range of persons entitled to take part in the proceedings under s. 37. In the result, in my opinion, the decision of quarter sessions was right, and it had no jurisdiction to hear the appeal.

MACKINNON L.J. I agree. The question involved is highly technical, but the question of jurisdiction is necessarily a matter of technicality, and on the provisions of this Act I am satisfied that the Bents Brewery Company were not proper parties in the proceedings, or entitled to appear at quarter sessions. Therefore, quarter sessions had no jurisdiction to decide on the appeal raised before them, and this appeal must succeed.

UTHWATT J. I agree.

Appeal allowed.

Solicitors: *Warwick Williams & Marchant, for Bernard Kenyon, Wakefield; Godden, Holme & Ward, for Edwin Berry & Co., Liverpool.*

H. C. G.

ENGVALL *v.* IDEAL FLATS, LIMITED.

C. A.

1945

Jan. 16.

Lord Greene M.R., MacKinnon and Finlay L.JJ.

Landlord and tenant—Rent restriction—Tenancy agreement—Terms—Supply by landlords of hot water and central heating—Notice to determine tenancy—Holding over by tenant as statutory tenant—Rights of statutory tenant—" Terms and conditions of the original " contract of tenancy "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15.

Where a tenancy agreement relating to a flat contains provisions that the landlords shall supply continuous hot water and central heating to the flat, the tenant who holds over under the Rent Restriction Acts after the contractual tenancy has been determined is entitled to the benefit of those provisions as being " terms " and conditions of the original contract of tenancy," within s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Appeal from Cheltenham county court.

By a tenancy agreement, dated November 28, 1940, the landlords, Ideal Flats, Ld., let to the tenant, Miss E. V. Engvall, a flat on the ground floor of No. 5 Montpelier Parade, Cheltenham, for a term of three months from December 1, 1940, determinable thereafter by either party by three months' notice in writing, at the weekly rent of 23*s*., payable weekly in advance. By cl. 4 of the agreement the landlords agreed (amongst other things) (8.) to supply and maintain in the living rooms of the flat . . . . an adequate system of hot water or other radiators for central heating, and (9.) to supply the flat with constant hot water. On August 20, 1943, the landlords gave notice in writing to determine the tenancy on December 31, 1943, after which date they discontinued the supply of central heating and constant hot water, although the tenant continued to occupy the flat as a statutory tenant under the Rent Restrictions Acts.

On April 29, 1944, the tenant brought proceedings in the Cheltenham county court for 8*l*. 18*s*. 6*d*. damages for the landlords' failure to provide central heating and hot water as from December 31, 1943. The landlords contended that on the assumption that the flat was controlled under the Rent Restriction Acts as from the termination of the contractual tenancy, the provisions requiring them to supply hot water and central heating were not matters which fell into the control, and did not call for performance by them after the contractual tenancy ended.

The county court judge held that under s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenant, as a statutory tenant, was entitled to the benefit of all the terms and conditions of the contractual tenancy. He therefore gave the tenant the amount of damages claimed. The landlords appealed.

Geoffrey Howard for the landlords. Section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that a statutory tenant is to " observe and be " entitled to the benefit of all the terms and conditions of the " original contract of tenancy so far as the same are consistent " with the provisions of this Act," cannot be given so extended a meaning as to entitle the statutory tenant to all the amenities attached to many flats. The preamble to the Act shows that its object is to consolidate the law as to "increase of rent and " recovery of possession of premises " by the landlord and while in a case like the present the landlords cannot get possession of the premises let by them, there is no reason why they should be compelled to supply hot water and central heating. At common law any landlord can say that he is no longer going to give services, and that if the tenant wants to continue the tenancy he must bear certain burdens, and there is no reason why the position of the landlord should not be the same in respect of premises covered by the Rent Restriction Acts. Section 15 only applies to terms connected with the actual tenancy and not to collateral terms. The supply of hot water and central heating is something quite outside the tenancy. When those services ceased to be given, it would be for the county court judge to reduce the rent in determining the standard rent. The tenant can always apply to have the rent reduced if he is paying more than the standard rent, and where services are no longer being given by the landlord that must be a ground for reducing the standard rent. The present proceedings are misconceived. The tenant should have applied to have the standard rent fixed by relation to the fact that services were no longer being given. In any case the judge has awarded excessive damages, amounting over the period in question to half the rent.

Astell Burt for the tenant. Practically every tenancy agreement of a house or flat imposes on the landlord some obligations involving work and labour, as for example, the obligation under a repairing covenant to do external repairs. It could hardly be said that such obligations would come to an end with the contractual tenancy. In so far as counsel has sought to distinguish between usual and unusual covenants, it can hardly be said the provisions for the supply of hot water and central heating are not usual. In many cases, if a landlord can put an end to his obligations of this kind, a flat would be rendered uninhabitable. There are many flats which have no fireplaces because of landlords' covenants to supply hot water and central heating throughout a block of flats. Section 15, on its true construction, entitles the statutory tenant to the benefit of all the terms and conditions of the tenancy agreement, including those of which the landlords are now seeking to deprive the tenant.

Geoffrey Howard in reply referred to *Bell Property Trust, Ld.* v. *Hampstead Assessment Committee* (1).

LORD GREENE M.R. In this case an action was brought by the statutory tenant to recover damages for the breach of the landlords' obligation to provide hot water and heating services, and the county court judge awarded damages amounting to 8*l*. 18*s*. 6*d*. for the breach of that undertaking over the period covered by the claim. A complaint was made as to the amount of those damages. It may be that the judge put the damages rather on the high side, but we cannot interfere with that. There is no error of law in his method of arriving at the damages, nor are they so extravagant as to be beyond the limit at which a reasonable man could put them. No complaint of the quantum of damages awarded in this case can be entertained in this court.

The point which is raised on the appeal is whether the undertaking by the landlords to provide hot water and heating was or was not one of the obligations imported into the statutory tenancy under s. 15 of the Act of 1920. It was said that, when a contractual tenancy is brought to an end, either by expiration of time or by notice, the section only keeps alive as terms of the statutory tenancy a limited class of the obligations which are to be found in the contractual tenancy, and that obligations which fall outside that class, being purely contractual in their nature, necessarily came to an end. So far as is relevant, the language of the section provides that the tenant who, by virtue of the provisions of the Act, retains possession " shall, so long

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(1) [1940] 2 K. B. 543.

C. A.

1945

ENGVALL v. IDEAL FLATS, LD.

Lord Greene M.R.

" as he retains possession, observe and be entitled to the benefit " of all the terms and conditions of the original contract of " tenancy so far as the same are consistent with the provisions " of this Act." That language is comprehensive and clear. Applying it in its clear prima facie meaning to the question in this case, the obligation of the landlord to provide hot water and central heating is one of the terms of the original contract of tenancy. It is a term which is not inconsistent with the provisions of the Act. Therefore it would appear, reading the words in their natural sense, that the tenant is entitled to the benefit of those undertakings by the landlord. But it is said that a more restricted meaning must be put upon the section, and that when the legislature used the phrase " all the terms " and conditions " it cannot possibly have meant this. Otherwise, it was argued, it would mean that a landlord who had, in the tenancy agreement, entered into undertakings to provide services outside the ordinary covenants to be expected in a lease, would find himself compelled, in a case where the Act applied, to continue those services so long as the house remained a controlled house. It would, or might be, it was said, be a great hardship to put such an obligation on him, and therefore the section should be construed in some more limited way.

I can find nothing in the context, or in the other parts of the Act, which would justify me in writing such a limitation into the clear language used by the legislature. The phrase is a clear and comprehensive expression which, in my judgment, would require an equally clear context to cut it down. I cannot find it. Indeed from a practical point of view there seems to be very good reason why the legislature should have refrained, in view of the class of dwelling-house covered by the Act, from drawing any such distinction. As Mr. Burt has pointed out, in the case of flats it is customary for a variety of services to be performed, and it is common to find that, without the performance of those services, the flats will be uninhabitable. One example that he gave which particularly struck me was the matter of heating. It is common knowledge that in a block of flats which is provided with central heating service, the architect who designs the flats makes no provision for fireplaces. One of the great attractions to some people of living in such a flat is not to have to bother with fireplaces. If the landlord lets a flat with an undertaking to keep the central heating system going, and then is at liberty, when the contractual tenancy comes to an end, to stop that particular service, the value of the statutory tenancy to the tenant would be largely, if not completely, destroyed.

It is to be observed, if Mr. Howard's argument is right, that every obligation of the class which he has in mind automatically comes to an end when the contractual tenancy is determined, for the simple reason that the section, on his construction, does not provide for the carrying over of such obligations into the statutory tenancy. It would mean that in every case where a controlled flat has been let and the tenancy includes an obligation to provide hot water and central heating, directly the notice which the landlord serves has expired, or the lease comes to an end by effluxion of time, the landlord could turn off the hot water and discontinue the heating system. It seems to me that the legislature, if it directed its mind to this point at all, would not unreasonably have come to the conclusion that such a result was not what it intended.

There is another difficulty in Mr. Howard's way, because quite clearly the cessation of the landlord's obligation must, in all fairness and justice, carry with it a right on the part of the tenant to obtain a reduction of rent. To construe the section in such a way as to deprive the tenant of the services, and leave him liable for the same rent as before, would shock the conscience. Mr. Howard's method of dealing with that difficulty is to say that the tenant in those circumstances could obtain the fixing of a standard rent which would be lower than the contractual rent, and would be the amount of rent properly attributable to what was left to the tenant, namely, the bare demise without the services. I can find nothing in the Act which makes provision for procedure of that kind. Indeed, it seems to me that to suggest that such a procedure is competent is in conflict with the provisions of the Act which lay down what the standard rent is to be.

As I have said, I can find nothing which would justify the cutting down of the words of s. 15, and there is no context which would entitle me to do so. In my judgment, therefore, that point fails.

MACKINNON L.J. I agree. This Act, in conceivable circumstances, may lead to very strange results, but that arises from the terms in which it is drafted. I think that the plaintiff was lucky in the amount of damages she was awarded, but that, again, is a matter for the county court judge to decide, and we cannot interfere with his decision. I agree that the appeal fails.

FINLAY L.J. I also agree. I only want to add one word on the construction of s. 15 of the Act of 1920. I agree with what the Master of the Rolls has said. For myself I cannot see that the construction of the section admits of any doubt. One may think of reasons why the section might have been expressed differently, but it seems to me to bear only one construction. The words, so far as they are material, are: "a tenant . . . "shall, so long as he retains possession, observe and be entitled "to the benefit of all the terms and conditions of the original "contract of tenancy, so far as the same are consistent with "the provisions of this Act." Of course, if there was a term or condition inconsistent with the provisions of the Act, quite different considerations would come into play; but, unless that point arises, it seems to me that the section is perfectly plain in saying that, so long as he retains possession, he is to observe, and he will be entitled to the benefits of, all the terms and conditions of the original tenancy.

Appeal dismissed.

Solicitors: *Williamson, Hill & Co., for Russell, Orme & Dykes, Ledbury; Barlow, Lyde & Gilbert, for Ivens, Thompson & Green, Cheltenham.*

H. C. G.

1945
Jan. 15.
Stable J.

D. AND L. CATERERS, LIMITED AND JACKSON *v.* D'AJOU.

Defamation—Slander—Limited liability company—Imputation of crime punishable corporally—Words calculated to injure reputation in relation to trade or business—Presumption of actual damage.

A slander imputing to a limited liability company the commission of a criminal offence which, when committed by an individual is punishable corporally, or a slander on it calculated to injure its reputation in relation to its trade or business is actionable at the suit of the company without proof of special damage.

ACTION tried by Stable J.

The claim was for slander spoken and published of the plaintiff company, and of the second plaintiff, its managing director, on October 27, 1943, and November 3, 1943, to a Mr. Levene. The alleged slanders were said to be in breach of agreements made by the defendant on October 8, 1942,

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with the managing director, and on October 18, 1943, with the company. The plaintiffs claimed damages and an injunction. It was found by the judge that by the words spoken on each occasion the defendant was deliberately telling Mr. Levene that the plaintiff company, which owned a restaurant, and the plaintiff Jackson were in fact carrying on the business of a restaurant illegally and in defiance of the Defence of the Realm Regulations, and were committing criminal offences, which could be punished corporally, i.e., by imprisonment. Stable J. also held that each publication was a breach of the agreements made on October 8, 1942, and October 18, 1943.

Serjeant Sullivan K.C. and *T. F. Davis* for the defendant: Slander is actionable per se, that is, without proof of actual damage, where the words charge the plaintiff with having committed a criminal offence for which he could be punished corporally, e.g., by imprisonment. But a limited liability company cannot be so punished. It follows, therefore, that if a limited liability company is slandered by the allegation of a criminal offence, the company must allege and prove special damage. The arbitrary exception to the general rule that actual damage must be alleged and proved, where an individual is slandered in relation to his profession, trade or business, was laid down at a time when trading companies were not prevalent and perhaps did not exist. These exceptions to the rule are not to be extended. See the judgment of Viscount Haldane in *Jones* v. *Jones* (1). No case can be found among the authorities of a corporation having successfully sued for slander in connexion with its trade or business, without alleging and proving special damage. That state of things could hardly arise from the fact that no one ever said an ill word against a company or a corporation, and is an indication that no such action is maintainable without proof of damage. In *South Hetton Coal Co., Ld.* v. *North-Eastern News Association, Ld.* (2) Lopes L.J. said (3): "In a case of slandering *a man* in "respect of his office, profession, or trade, it is not necessary "to allege or prove special damage" and he continued, "nor "is it necessary in the case of *libelling* a corporation or company "in respect of their trade or business." Kay L.J. said (4): "if a slander be spoken calculated to injure an *individual* in "his trade, it is not necessary to allege or prove special damage

(1) [1916] 2 A. C. 481, 489.
(2) [1894] 1 Q. B. 133.
(3) Ibid. 143.
(4) Ibid. 145–6.

"to found the action." It is plain from the selection of words by these lords justices that, in their opinion, a company or corporation suing for a slander in relation to its trade or business must allege and prove special damage.

Macaskie K.C. and *Robert Fortune* for the plaintiffs: A limited liability company can maintain an action for either libel or slander for any words which are calculated to injure its reputation in the way of its trade or business, and this without alleging or proving special damage. No distinction is made in *Jones* v. *Jones* (1) between the case of an individual and a corporation. In *South Hetton Coal Co., Ld.* v. *North-Eastern News Association, Ld.* (2) it was held that an action will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation and in the way of its business, without proof of special damage. In that case no distinction is made between the cases of libel and slander. In *Jones* v. *Jones* (3) Lord Sumner said that the law will infer the damage needed to found the action in the case of defamation, spoken or written, when words are spoken of a person following a calling and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling. Slander is actionable without proof of special damage where the words published charge the plaintiff with having committed a crime which can be punished corporally. It is irrelevant that a particular plaintiff cannot be punished corporally.

Serjeant Sullivan K.C. replied.

Stable J. having stated the facts held that the plaintiff Jackson was entitled to damages for slander and for breach of contract, and the plaintiff company to relief for breach of contract and continued: That relief would amount to no more than nominal damages and perhaps to an injunction. The question then arises, and it is a question of some interest: Can a company successfully sue for slanders, or perhaps more accurately, for spoken defamatory statements which (1.) impute that it has been guilty of a criminal offence for which an individual can be tried, convicted and punished corporally; or (2.) are calculated to injure its reputation in relation to the business which it carries on, in the absence of allegation and proof that actual damage has been sustained as a result of the defamations of which complaint is made? In my judgment it can do so in both cases.

(1) [1916] 2 A. C. 481.
(2) [1894] 1 Q. B. 133.
(3) [1916] 2 A. C. 500.

It is true that, in the absence of actual damage, a slander, which imputes a criminal offence, must impute the commission of a criminal offence which can be punished corporally and it is true that a company cannot be punished corporally at all: it cannot be either flogged, sent to prison or hanged. But it seems to me that the category of the crime must be determined by the punishment applicable to the particular crime, irrespective of whether that punishment can be applied to the particular person by whom the crime is said to have been committed. In this case there is no doubt that under the Defence of the Realm Regulations offences, such as those imputed by the defendant, can be punished by imprisonment as well as by fine, and I think that a defamatory publication which suggests that a company is carrying on a business or employing methods in carrying on the business, which, if it were a natural person, might result in its being sent to prison, is none the less actionable at the instance of an artificial persona, albeit that persona in the very nature of things cannot be imprisoned.

I have next to consider whether when the defamatory publication is spoken of a limited liability company in connexion with its business, the company is in the same position as a natural person and can sue without proof of actual damage. I have not found that question easy to answer. *South Hetton Coal Co., Ld.* v. *North-Eastern News Association, Ld.* (1) is the recognized authority for the proposition that an incorporated trading company can sue for libel where the libel is calculated to injure its reputation in the way of its business, without alleging or proving special damage: but there are two passages in the judgments in that case which have caused me some difficulty. Lopes L.J. said (2): "In a case of slandering "a man in respect of his office, profession, or trade it is not "necessary to allege or prove special damage; nor is it "necessary in the case of libelling a corporation or company "in respect of their trade or business. In my judgment this "action by the plaintiffs will lie." It is possible to infer from that passage that the lord justice was deliberately confining the exception in the case of slander, where no actual damage is alleged, to the case where a man is slandered, and that in using the words "libelling a corporation," he was deliberately confining his observations to an action for libel and avoiding the more comprehensive word "defaming." Kay L.J. said (3):

(1) [1894] 1 Q. B. 133.
(2) Ibid. 143.
(3) Ibid. 145–6.

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" In the first place, if a slander be spoken calculated to injure " an individual in his trade "—the lord justice employed, if he did not select, the word " individual "—" it is not necessary " to allege or prove special damage to found the action, that " being an exception to the general rule that in actions of " slander special damage must be alleged and proved." It is remarkable that there is no reported case to which my attention has been called in which a corporation has sued for slander in connexion with its business and has succeeded in the action and recovered damages, without alleging and proving actual damage. At one time I was impressed by the view that the reason for this is that no such action could be maintained. On this issue my attention was also directed to *Jones* v. *Jones* (1) where Viscount Haldane said (2): " He," [the trial judge] " seems to have regarded the decided cases as having laid down " a broad principle, which could be legitimately extended to " a case like the present. My Lords, I think that is not so. " The action for slander has been evolved by the courts of " common law in a fashion different from that which obtains " elsewhere. As one of the consequences, the scope of the " remedy is in an unusual degree confined by exactness of " precedent. It is not for reasons of mere timidity that the " courts have shown themselves indisposed to widen that scope, " nor do I think your Lordships are free to regard the question " in this case as one in which a clear principle may be freely " extended. Lord Herschell, in his judgment in *Alexander* v. " *Jenkins* (3) remarked of this very point that ' when you are " ' dealing with some legal decisions which all rest on a certain " ' principle, you may extend the area of those decisions " ' to meet cases which fall within the same principle ; but " ' where we are dealing with such an artificial law as this " ' law of slander, which rests on the most artificial distinctions, " ' all you can do is, I think, to say that if the action is to be " ' extended to a class of cases in which it has not hitherto " ' been held to lie, it is the legislature that must make the " ' extension and not the court '." Then, after a very interesting historical survey, Viscount Haldane continued (4) : " As " might have been expected of civil courts, whose concern " had been primarily with material rights and not with " discipline as such, the new jurisdiction in claims based " on slander appears to have been directed to the ascertainment

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(1) [1916] 2 A. C. 481.

(2) Ibid. 489.

(3) [1892] 1 Q. B. 797, 801.

(4) [1916] 2 A. C. 490.

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" of actual damage suffered and to a remedy limited to such " damage. This explains the restricted character of the " development of the remedy and the tendency to confine " its scope by the assertion that actual damage was the gist " of the action." In conclusion he said (1) : " I agree with " what was said by Lord Herschell in the judgment in " *Alexander* v. *Jenkins* (2), which I have already quoted, and " with the carefully-guarded judgment of Swinfen Eady L.J., " in the present case." Those passages seem to offer some support for the propositions which may be summarized as follows : that the true legal position is that actual damage is essential as part of a cause of action in an action for slander. That in the early days of our law, before trading companies occupied the prominence that they do to-day, or even perhaps before such corporations existed, certain rigid, arbitrary, and it may be, illogical exceptions to that rule were laid down. That those exceptions are rigid and can only be extended if extension is considered desirable by the legislature, with the result that it would be wrong to hold to-day that the exception in the case of a slander calculated to injure reputation in the way of a profession, trade, calling or business is not strictly confined to that category of persons who no doubt were in mind at the time when that exception was first introduced, a category which is not wide enough to include a limited liability company.

However, having read Lord Sumner's speech in *Jones* v. *Jones* (3) I have come to a different conclusion and hold that where the slander is calculated to injure reputation in respect of a profession, trade, business or calling, the action may be brought by a company without allegation or proof of actual damage since the law presumes it.

This is what Lord Sumner said (4) : " this part of the law " of slander has sometimes come in for pretty sharp criticism, " particularly from the judges who have applied it. The " Court of Appeal in the present case says (5) : ' the law of " ' slander is an artificial law . . . . It is not like a law founded " ' on settled principles, where the court applies established " ' principles to new cases, as they arise.' I think this does " the common law on the subject less than justice. The law " of defamation is founded on settled principles. Defamation,

(1) [1916] 2 A. C. 492.
(2) [1892] 1 Q. B. 797.
(3) [1916] 2 A. C. 481, 493.
(4) Ibid. 500.
(5) [1916] 1 K. B. 358.

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" spoken or written, is always actionable if damage is proved, " and, even if it is not, the law will infer the damage needed " to found the action (1.) when the words are written or " printed ; (2.) when the words spoken impute a crime punishable with imprisonment . . . . (4.) when words are spoken " of a person following a calling, and spoken of him in that " calling, which impute to him unfitness for or misconduct in " that calling. The classification is one of words, not of " persons, but it is a classification only. There is no reason " why all four classes of words should be held to import legal " damage for the same or for some analogous reason. I think " these rules are as well established, as worthy of being called " principles, and as capable of being applied to new cases when " they arise, as are most rules or principles of law or equity. " Perhaps they are neither ideally just nor ideally logical, but " principles are like that. For myself I am quite content to " take the law as I find it." It seems to me that Lord Sumner is saying that in defamation by the spoken word actual damage must be alleged and proved as an essential ingredient in the cause of action, except in certain cases where the law infers it. I think that is the true view of the law, and it seems to me, therefore, that in this case it is immaterial whether the plaintiff is an individual or a limited liability company.

There will be judgment for the plaintiff company for 54*l.*, and for the plaintiff Jackson for 52*l.*, and an injunction to restrain the defendant from repeating the slanders.

Judgment for plaintiffs.

Solicitors for plaintiffs : *B. A. Woolf & Co.*
Solicitor for defendant : *E. C. Randall.*

C. G. M.

[1947] A.C. 156

C. A.

READ *v.* J. LYONS & COMPANY, LIMITED.

1944

Nov. 2, 3, 6, 7 ; Dec. 14.

Scott, MacKinnon and du Parcq L.JJ.

Factory—Occupier—Manufacture of explosives—Explosion—Cause unknown—No negligence by occupier—Personal injury to person lawfully on premises—Liability.

The plaintiff R., who was employed as an inspector of munitions by the inspection department of the Ministry of Supply, was injured in the course of her duties, while in a munitions factory operated by the defendants, by the explosion of a high explosive shell during the process of manufacture. The cause of the explosion was not known, but it was admittedly not due to any negligence on the part of the defendants, who were operating the factory under a contract with the Ministry of Supply, by the terms of which the defendants were declared to be the agents and servants of the Ministry. The plaintiff had been directed to her work as an inspector under the Essential Work Order, and her wages were paid by the Ministry. The trial judge awarded the plaintiff damages against the defendants on the ground that they were carrying on an ultra-hazardous activity and were therefore under a strict liability to a person lawfully on their premises. On appeal:—

Held, that the rule of strict liability imposed on the owner or occupier of land for damage caused by the escape, though without negligence on his part, of some dangerous thing which he had confined there on to the land of another, had no application to an accident incidental to the process of manufacture or industry occurring to a person lawfully on the premises, whether as servant, invitee or licensee; and that the defendants, not having been guilty of negligence, were not liable to the plaintiff.

Decision in *Rylands* v. *Fletcher* (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330, explained and distinguished.

APPEAL from Cassels J.

The plaintiff, Mrs. Norah Read, who was employed as an inspector of munitions by the armaments inspection department of the Ministry of Supply, was injured in the course of her duties, on August 31, 1942, while in a munitions factory operated by the defendants, J. Lyons & Co., Ld., by the explosion of a high-explosive shell during the process of manufacture. The plaintiff had not voluntarily undertaken her work as an inspector but had been directed to it under the Essential Work Order by the Minister. She was treated as being a servant of the Ministry, and her wages were paid by the department. The defendants manufactured high-explosive shells under a contract, dated January 29, 1942, with the Ministry of Supply, by the terms of which (inter alia) the defendants were stated to be the agents and servants of the Minister, and were to operate under his orders and directions. The plaintiff and the defendants admitted that they knew the dangerous nature of the work on which they were engaged. Negligence was not alleged against the defendants, who pleaded by their defence that the plaintiff voluntarily incurred the risk incidental to her employment, and that the statement of claim disclosed no cause of action.

Cassels J. held that the defence of volenti non fit injuria did not apply, and that the defendants carried on ultrahazardous activities in the factory and were therefore under strict liability to the plaintiff. He gave judgment for the plaintiff and awarded damages in the sum of 575*l.* 2*s.* 8*d.* The defendants appealed.

Sir David Maxwell Fyfe S.-G. and *Valentine Holmes* for the appellants. There was no escape here from the land of the defendants of something which was not naturally there, and which was likely to do damage, within the meaning of the rule laid down by Blackburn J. in delivering the judgment of the Exchequer Chamber in *Rylands* v. *Fletcher* (1), which was upheld in the House of Lords (2). Blackburn J. formulated the question at issue in these words: " What is the obliga-" tion which the law casts on a person who, like the defendants, " lawfully brings on his land something which, though harmless " while it remains there, will naturally do mischief if it escape " out of his land " (3).

After considering separately the authorities on (*a*) cattle trespass, (*b*) wild animals, (*c*) nuisance, and (*d*) the escape of fire, Blackburn J. cited *Tenant* v. *Goldwin* (4) and formulated the rule that " the person who for his own purposes brings " on his lands, and collects and keeps there, anything likely " to do mischief if it escapes," must keep it in at his peril, and if he does not do so " is prima facie answerable for all the " damage which is the natural consequences of its escape " (5). Winfield states in his text book on the Law of Torts, 2nd ed., 1943, at p. 526, that unless there is an escape of the " substance " from the occupier's land there is no liability under the rule, and he cites *Howard* v. *Furness Houlder Argentine Lines, Ld. & A. & R. Brown, Ld.* (6), where Lewis J. found in favour of the defendants on the ground that there was no escape of steam —the mischievous " substance " in that case—off the premises. In *Ponting* v. *Noakes* (7) Charles J. said (8) :—" The decision " —*Rylands* v. *Fletcher* " only refers to the escape from a " defendant's land of something which he has brought there, " and which is likely to do mischief if it escapes." Collins J., in the same case, considered the rule in very similar terms (9). See also *Western Engraving Co.* v. *Film Laboratories, Ld.* (10).

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(1) (1866) L. R. 1 Ex. 265.

(2) (1868) L. R. 3 H. L. 330.

(3) (1866) L. R. 1 Ex. 279.

(4) (1704) 1 Salk. 21, 360; 2 Ld. Raym. 1089.

(5) L. R. 1 Ex. at p. 279.

(6) [1936] 2 All E. R. 781.

(7) [1894] 2 Q. B. 281.

(8) Ibid. 284.

(9) Ibid. 287–288.

(10) [1936] 1 All E. R. 106.

The rule extends to the case where the defendant has brought the "substance" on land over which he has a franchise, namely, the right to use the land founded on a statute or by private permission *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (1). With regard to the escape of wild animals, he referred to *May* v. *Burdett* (2), *Besozzi* v. *Harris* (3), *Filburn* v. *The Peoples Palace and Aquarium Co., Ld.* (4). To come within the rule, the dangerous "substance" must escape from the physical geographical area under the control of the defendant. Where a person goes on to the land of another the duties of the occupier towards him have been prescribed by the law according to whether he is a trespasser, licensee or invitee. There must always be some element of negligence, that is, the absence of a reasonable amount of care in the actual circumstance, to make the occupier liable—Per Lord Dunedin in *Oliver* v. *Saddler* (5), Winfield on Torts (2nd ed.) 584, Salmond on Torts (9th ed.) 542. Here the defendants were not the occupiers of this land; they were only the agents of the Ministry of Supply.

It is only where there has been an unnatural use of land that the rule in *Rylands* v. *Fletcher* (6) applies and the liability is absolute. The use of land for making munitions in war-time is not an unnatural use—Salmond on Torts (9th ed.), 573, 575.

Paull K.C. and *Goldie* for the respondent. Section 519 of the American "Restatement of the Law of Torts," though, of course, not of authority in English courts, correctly sets out the law of this country. Section 519 (Vol. III., page 41) reads: "Miscarriage of ultrahazardous activities carefully carried on. "Except as stated in ss. 521 to 524, one who carries on an ultrahazardous activity is liable to another whose person, land or "chattels the actor should recognise as likely to be harmed by "the unpreventable miscarriage of the activity for harm "resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent "the harm." The principle underlying *Rylands* v. *Fletcher* (6) is really an application of the old maxim Sic utere tuo ut alienum non lædas: per Lord Moulton in *Rickards* v. *Lothian* (7). Escape from the land on which the activity is carried on is not a necessary element, otherwise a most extraordinary case might arise. For instance, where an explosive is being unloaded from a building into a lorry below, outside the land. Three men are unloading from the building; three others loading on to the lorry, and another is just inside the building below. An explosion occurs and all are injured. The men in the lorry succeed in their claim, those in the building fail, and it is doubtful as to the third man. *Rylands* v. *Fletcher* (1) is not based on property, but on the carrying on of a dangerous activity, and it is immaterial whether that is carried on on the land or outside. [*Honeywill and Stein* v. *Larkin Bros., Ld.* (2) was referred to.] In the report of *Rylands* v. *Fletcher* (1) in the Exchequer Chamber, the first catchword "Trespass" is wrong. The headnote in the House of Lords reports is right, but, owing to the classical judgment of Blackburn J., the former report is generally cited, and so the element of escape is emphasized. [Salmond on Torts (9th ed.) 602, Broom's Legal Maxims (10th ed.) 239, and Charlesworth on Negligence, page 219, were referred to.] If a person carries on an extra-hazardous occupation, something which is likely to injure his neighbour, he is responsible if the neighbour's person or property is thereby injured. "Neighbour" must in such a case be construed in the sense in which Lord Atkin construed it in *Donoghue* v. *Stevenson* (3). This is a general principle of English law. If the activity is so common as to be generally done it constitutes an exception to the rule. According to the contention of the Solicitor-General the question of liability depends on whether the person injured is outside the premises where the extra-hazardous occupation was carried on. That is not the proper test of liability. In *Rylands* v. *Fletcher* (1) liability is stated in the headnote as follows: "One who for "his own purposes brings upon his land and collects and keeps "there anything likely to do mischief if it escapes, is prima "facie answerable for all the damage which is the natural "consequences of its escape." "Escape" there means "escape from control," and not "escape from the premises." Neither in the judgment of Blackburn J. in the Exchequer Chamber, nor in the opinions delivered in the House of Lords, was stress laid on the escape from the premises as being material to the liability, but on the mischief arising from the article or activity not being kept under proper control. In *Fletcher* v.

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(1) [1914] 3 K. B. 772.

(2) (1846) 9 Q. B. 101.

(3) (1858) 1 F. & F. 92.

(4) [1890] 25 Q. B. D. 258.

(5) [1929] A. C. 584, 599.

(6) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(7) [1913] A. C. 263.

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(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1934] 1 K. B. 191.

(3) [1932] A. C. 562, 580.

Rylands (1) the mischief was due to the escape of water. The declaration in that case was for negligence, and not for an escape of water from the defendant's premises. In *In re Williams* v. *Groucott* (2), Blackburn J. relied on the general rule of law that "a man is bound to use his property so as not "to injure his neighbour," and added that, "when a party "alters things from their normal condition, so as to render them "dangerous to already acquired rights, the law casts upon him "the obligation of fencing the danger, in order that it shall not "be injurious to those rights."

Blackburn J. in *Fletcher* v. *Rylands* (3) said that "the true "rule of law is that the person who for his own purposes "brings on his lands and collects and keeps there anything "likely to do mischief if it escapes, must keep it in at his peril, "and, if he does not do so, is prima facie answerable for all "the damage which is the natural consequences of its escape." Blackburn J. referred to the obligation of the owner of cattle, which he has brought on his land, to prevent their escaping and doing mischief, and he cited *Cox* v. *Burbidge* (4) in support of his proposition.

[du Parcq L.J. referred to *H. & C. Grayson, Ld.* v. *Ellerman Line, Ld.* (5).] In the House of Lords Lord Cairns L.C. based his judgment in *Rylands* v. *Fletcher* (6) on the non-natural use of the land by the defendant by the accumulation of water thereon, and his consequent liability for its escape therefrom. Lord Cranworth (7) based his judgment on a different principle. He said the question was not "whether the defendant has "acted with due care and caution, but whether his acts have "occasioned the damage." A person "is bound sic uti suo ut "non lædat alienum," and he based his judgment on the old case of *Lambert* v. *Bessey* (8) which was a case of trespass and false imprisonment. In *Jones* v. *Festiniog Ry. Co.* (9) the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and it was held that they were therefore at common law bound to keep the engines from doing injury, and if sparks escaped and caused damage, the defendants were liable for the consequences though there had been no negligence on their part. In *Filburn* v.

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(1) L. R. 1 Ex. 265.

(2) (1863) 4 B. & S. 149, 157.

(3) L. R. 1 Ex. 279.

(4) (1863) 13 C. B. (N.S.) 430.

(5) [1919] 2 K. B. 514; [1920] A. C. 466.

(6) L. R. 3 H. L. 330.

(7) Ibid. 341.

(8) (1680) Sir T. Raym. 421.

(9) (1868) L. R. 3 Q. B. 733.

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Peoples Palace and Aquarium Co. (1) the plaintiff had been attacked and injured by an elephant which fell within the class of animals which are dangerous to mankind. Bowen L.J. said (2) that "the broad principle that governs this case is "that laid down in *Fletcher* v. *Rylands* (3) that 'a person "'who brings upon his land anything that would not naturally "'come upon it, and which is in itself dangerous, must take "'care that it is kept under proper control'." In *West* v. *Bristol Tramways Co.* (4) the company had laid down in the road wood paving which had been impregnated with creosote which gave off fumes which injured the plaintiff's plants. It was held that the plaintiff had a right of action at common law, and that the defendants were not protected by their special Act of Parliament which did not authorize the use of wood blocks impregnated with creosote. Farwell L.J. based his judgment in that case upon the non-natural use of the land by the defendants. In *Wing* v. *London General Omnibus Co.* (5), Fletcher Moulton L.J. expressed the view that "where by "excessive use of some private right a person has exposed his "neighbour's property or person to danger . . . . should "accident happen therefrom, even through the intervention "of an event for which he is not responsible, and without "negligence on his part, he is liable for the damage."

The rule in *Rylands* v. *Fletcher* (3) makes the owner of land who "brings upon his land anything which would not "naturally come upon it, and which in itself is dangerous, and "may become mischievous if not kept under proper control, "though in so doing he may act without personal wilfulness or "negligence . . . . liable in damages for any mischief thereby "occasioned—not mischief necessarily occasioned to the "owner of the adjoining land, but any mischief thereby "occasioned"—per Bray J. in *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (6).

Mr. Charlesworth in his work on Negligence at p. 219 says that "the opinion has been expressed that there is no liability "under *Rylands* v. *Fletcher* (3) unless the dangerous thing "escapes from off the premises of the person keeping the thing, "that is to say, that a person injured on the premises cannot "recover under the rule. This opinion would appear to be

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(1) [1890] 25 Q. B. D. 258.

(2) Ibid. 261.

(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(4) [1908] 2 K. B. 14.

(5) [1909] 2 K. B. 652, 665.

(6) [1914] 3 K. B. 772, 785.

"based on the view that the rule only applies as between "adjoining landowners; once, however, it is understood that "the rule is subject to no such limitation, then it becomes clear "that it is immaterial whether the damage is caused by the "dangerous thing either on or off the premises of the owner. "If an explosion occurs in a factory where explosives are being "made every person who or whose property is lawfully on the "premises, and is injured, is as much entitled to recover as if "the injury was done to his person or property on adjoining "land or on the highway." That statement is directly in point in the present case. In *Rainham Chemical Works, Ld.* v. *Belvedere Fish Guano Co., Ld.* (1), the House of Lords held that the manufacture of explosives on land was not the common and ordinary use of land, or, as Lord Sumner put it, was a non-natural use of the land and Lord Buckmaster said (2) "even apart from negligence the use of land by one person "in an exceptional manner that causes damage to another, "and not necessarily an adjacent owner, is actionable."

The House of Lords did not accede to the argument of Sir John Simon K.C. that the doctrine in *Rylands* v. *Fletcher* (3) does not apply when the manufacture of explosives is carried on under the direction of the Minister of Munitions, in the exercise of the Minister's powers given by the Regulations for the Defence of the Realm for the general benefit of the community. In the present case the defendants were not bound to carry on the manufacture of explosives; they were doing so for private profit. In *Honeywill and Stein, Ld.* v. *Larkin Brothers, Ld.* (4), Slesser L.J. said "A person causing something "to be done, the doing of which casts on him a duty, cannot "escape from the responsibility attaching on him of seeing that "duty performed by delegating it to a contractor. He may "bargain with the contractor that he will perform the duty ". . . . but he cannot thereby relieve himself from liability "to those injured by the failure to perform it . . . . it is only "necessary to consider that part of this rule of liability which "has reference to extra-hazardous acts, that is, acts which in "their very nature involve in the eyes of the law special "danger to others; of such acts the causing of fire and ex"plosion are obvious and established instances." The dictum of Lord Wright in *North Western Utilities, Ld.* v. *London Guarantee and Accident Co.* (5) was also referred to.

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(1) [1921] 2 A. C. 465.
(2) Ibid. 471.
(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.
(4) [1934] 1 K. B. 191, 197.
(5) [1936] A. C. 108.

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Sir D. Maxwell Fyfe S.-G. in reply.

Cur. adv. vult.

Dec. 14. The following judgments were read.

SCOTT L.J. This case is elemental. It goes to the roots of the common law. It has been argued, and well argued on first principles by Mr. Paull for the plaintiff, who was given judgment below by Cassels J. The appeal cannot be decided without considering first principles, and, to some extent, looking into the historic origins and development of the law of torts. That consideration is both due to counsel, and also, in my opinion, necessary for our decision, although the main argument for the Crown, on behalf of the defendants, was based on the scope of *Rylands* v. *Fletcher* (1) and more recent decisions.

The plaintiff was injured by the explosion of a shell in a shell-filling factory which was being operated by the defendant company on behalf of the Ministry of Supply. She was not a servant of the defendants, but was lawfully present as an inspector appointed and paid by the Ministry of Supply. The defendants were not guilty of any negligence, but Cassels J. awarded her 575*l.* 2*s.* 8*d.* damages. There were in the court below, and still are, two issues, namely, (1.) whether in the circumstances of the case the plaintiff had a cause of action at common law; and (2.) assuming that she had, was her right to recover barred on the principle of the maxim "volenti non "fit injuria?" I will deal with the first and main question first. The action is not expressed as an ordinary action of negligence. Negligence is not alleged in the statement of claim. The defendants are alleged to have been "occupiers" of the factory and to have known that explosive shells are dangerous. That is all. The defendants deny that they were "occupiers," and plead that they were merely agents and managers of the Ministry of Supply. They further submit that the statement of claim disclosed no cause of action. The facts are not in dispute. The defendants' position in the factory was that they were there under the terms of an agreement with the Minister of Supply dated January 29, 1942, by which they were made his "agents and responsible managers," and were required to carry on the factory on his behalf under his orders and directions. The site, factory, plant and materials were his property. The employees, though engaged by the defendants, were only "deemed to be" their employees for the purpose of the agreement. By a clause of the agreement the Minister indemnified the agents against claims by third parties, such as that in the present case. The plaintiff's duty to the Minister was to inspect. She was in no contractual relation with, and owed no duty to the defendants, but was lawfully present in the factory when the shell exploded, because she was there pursuant to the Minister's orders. It was common ground below and before this court that all operatives and factory staff, even though deemed to be employed by the defendants, were, in fact, servants of the Minister, just as much as all inspectors, like the plaintiff, who were not even deemed to be employed by the defendants. Further, all alike were subject to and controlled by the compulsory restrictions of the Essential Work Orders made under the Defence (General) Regulations, 1939.

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(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

The cause of the explosion remains a mystery; but it is common ground that the defendants were guilty of no negligence in the ordinary sense of that word: that is to say, neither they nor anyone acting or purporting to act on their behalf were guilty of any want of due skill, care, or foresight, by way either of commission or omission. The learned judge, however, held that the defendants came under a rule of "strict liability" and that the plaintiff was entitled to damages. There is no appeal on the amount of damages. The case for the defendants both below and before us was conducted by the Solicitor-General and Mr. Valentine Holmes, instructed by the Treasury Solicitor, presumably because of the position of the defendants under the agreement, including the Minister's undertaking to indemnify them, to which I have referred.

Before the learned judge below, and before us, Mr. Paull on behalf of the plaintiff, put his case on two grounds: First, on a very far-reaching submission that a proposition formulated in the "Restatement of the Law of Torts," published in recent years by the American Law Institute, truly expresses a principle of the common law of England, and that that proposition covers this case. Secondly, as an alternative, on the ground that the case comes within the narrower principle of *Rylands* v. *Fletcher* (1). I will discuss his wider submission first. Mr. Paull, of course, did not rely on the book as an authority in this court, but cited the proposition as expressing his own submission. Of the book I speak with the highest respect as a statement of the trend of decisions in American law, but I only discuss its

(1) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

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propositions in relation to English law. The relevant passage appears in s. 519, on page 46, vol. III. It is worth noting that on page 47 it is called " a rule of absolute liability," not merely of strict liability, the appropriate term in English law, the *Rylands* v. *Fletcher* (1) type of liability. It follows after the chapter on liability for animals, with which vol. III. begins, the whole theory of negligence proper having been disposed of in vol. II. It reads as follows: " Miscarriage of " ultrahazardous activities carefully carried on. Except as " stated in ss. 521 to 524, one who carries on an ultrahazardous " activity is liable to another whose person, land or chattels " the actor should recognize as likely to be harmed by the " unpreventable miscarriage of the activity for harm resulting " thereto from that which makes the activity ultrahazardous, " although the utmost care is exercised to prevent the harm."

Even assuming that that rule may in some circumstances be in conformity with English law (on which, for the moment, I express no opinion), it is to be observed that the American Law Institute attaches to the universality of their rule certain important exceptions or qualifications. Mr. Paull did not refer to them, but the rule is only propounded as applying subject to those limitations. Section 520 of " Restatement " of the Law of Torts " reads: " Definition of ultra- " hazardous activity. An activity is ultrahazardous if it " (*a*) necessarily involves a risk of serious harm to the " person, land or chattels of others which cannot be " eliminated by the exercise of the utmost care, and " (*b*) is not a matter of common usage." So far as the accident in question is concerned, the defendants' activity may fall within para. (*a*); but para. (*b*) raises the question whether, during war, the manufacture of munitions might not be regarded as an activity " of common usage " so as to make it an exception to the liability of " ultrahazardous activities " predicated by s. 519. A further qualification is made by s. 521, entitled " Ultrahazardous activity carried on in pursuance of a " public duty." " The rule stated in s. 519 does not apply " if the activity is carried on in pursuance of a public duty " imposed upon the actor as a public officer or employee or as a " common carrier." That exception at once raises the question whether a munitions factory carried on, as this one was, by a company as " agent " for the Minister of munitions during war, pursuant to the Minister's directions, and under government licence, is not taken wholly out of the primary rule contained in s. 519, even assuming that section to be, as Mr. Paull contends, a correct statement of a general principle of English common law. In that context the American comment following s. 521 is of interest. It is as follows: "a. A public official a part of "whose duties is to make or store high explosives in large "quantities is not subject to the absolute liability imposed by "the rule stated in s. 519. Therefore, he is not liable unless "he is negligent in the manufacture or custody of the explosives or has selected a place for storing them which makes "their storage unnecessarily dangerous in the event of an "explosion." I cannot suppose that Mr. Paull is seeking to rely on the main rule without accepting its limitations, for the limitations are essential features, and indeed, where applicable, conditions of the rule itself. Assuming the "Restatement of the Law" to be a correct exposition of American law, an American court would, in my opinion, clearly decide the present appeal in favour of the defendants on the ground that, if they were in fact "carrying on the ultra-"hazardous activity," they were doing so solely "in pursuance "of a public duty imposed on the company as a public officer." Whether in war-time munition-making would in the U.S.A. be adjudged a "matter of common usage" within s. 520 I know not; and whether it ought in law so to be treated in England I postpone for the moment, as a somewhat similar question arises in regard to one of the rules in *Rylands* v. *Fletcher* (1), if that case, contrary to the contention of the Solicitor General, is susceptible of application to the present case.

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(1) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

I confess to judicial sympathy with Mr. Paull's endeavour to bring under one generic principle some of the rather heterogeneous torts with which English legal history has presented later-day lawyers. For the same reason my first reaction was to be critical of three contentions put forward for the defendants, namely, (1.) that the principle underlying the strict liability imposed by our common law in the three types of cases relating to animals is different in each; (2.) that the principle of *Rylands* v. *Fletcher* (1) is different from all the first three, in that it only arises where the water or filth escapes from the defendant's land and does damage outside it; and (3.) that nuisances of smoke and smells have no generic similarity to the other types. Historic differences in the forms of

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action, which gave birth to the various rights, have undoubtedly left a legacy of differences in the substantive law of to-day. None the less, there may be some element of unifying principle common to all the above torts, whether the original form was trespass, trespass on the case, or nuisance, although it does not by any means follow that that unifying element would entitle the plaintiff in such a case as the present to succeed merely by bringing herself within any one principle of law underlying all the specific causes of action to which I have referred. That there is one such unifying element in all torts was, I think, established by the illuminating analysis of Mr. Justice O. W. Holmes in the third and fourth lectures of his book on the Common Law, published in 1881, but that element falls far short of the comprehensive and universal rule enunciated in s. 519 of the American "Restatement of "the Law," and it is not one which would by itself, in my opinion, give the plaintiff a cause of action in English law, entitling her to hold her judgment in the present appeal.

I will deal first with the self-contained proposition of s. 519 of the American "Restatement of the Law of Torts" on which Mr. Paull relies. My first criticism of it is that our law of torts is concerned not with activities but with acts. It is the act of the defendant which entails liability on him for the harm happening to another, whether the act be one of commission or omission. It is not to his profession or trade that the eye of the law looks in its search for general rules in the law of torts. I limit the observation thus, because for exceptional purposes of public policy the common law does look at professions or trades. To protect the traveller the law imposed on the innkeeper a strict liability for the safe custody of the traveller's luggage and horses. So the "custom of the realm," or in other words the common law, imposed a similar liability on the common carrier, and the common farrier. But in each of the above causes of action the resultant rule might be expressed in modern terminology as a term of the contract implied in law. These instances therefore of the regard by the law of the defendant's "activity" are not exceptions to my general proposition that the law of torts is concerned not with the activity, but with the act of the defendant. That the plaintiff might declare alternatively on the case or in assumpsit does not affect my reasoning. That it is the act of the defendant which matters is made plain through Holmes' lectures; (see his sentence at the bottom of page 111): "The standard

" which the defendant was bound to come up to was a standard " of specific acts or omissions, with reference to the specific " circumstances in which he found himself." So it is also in the late Professor Holdsworth's analysis of the principles of civil liability in his great History of English Law : (see Book IV. ch. V., s. 6, vol. 8, at pp. 446 to 459 and 464 to 472). Holmes J. himself recognized that the " ultra-hazardous " attribute of an act (his word on p. 103 is " extra-hazardous ") is a relevant characteristic, which in certain circumstances may entail liability for the actor without any proof of conduct amounting to negligence in the common legal sense of that term. In such a case his view was that the ground of liability is that the actor ought to have foreseen the likelihood of the harm resulting ; but it is the act not the activity which concerns the law. The argument of those lectures is that the theory of torts must be sought somewhere in the debatable land between the crude mediæval rule that (subject to certain qualifications) the actor acts at his peril, and the ethical view of Austin that the liability rests entirely on moral blame. In his historical analysis he examines many quite diverse torts to be found in the books, whether wearing the clothes of trespass, of nuisance, or of negligence, and even those affected by intent or malice. On p. 102 of " The Common Law " at the bottom he states : " But a more exact scrutiny of the early books will " show that liability in general, then as later, was founded on " the opinion of the tribunal that the defendant ought to have " acted otherwise, or, in other words, that he was to blame." On p. 103 he goes on to say : " The principal authorities are the " shooting cases, and, as shooting is an extra-hazardous act, " it would not be surprising if it should be held that men do it " at their peril in public places. The liability has been put " on the general ground of fault, however, wherever the line of " necessary precaution may be drawn."

The conduct of such an " activity " as is the subject of the American Restatement in s. 519 is, in my opinion, wholly neutral ; of itself it imports no liability. Apart from (1.) cases of nuisance, in all of which the question of land arises, and (2.) cases where the plaintiff's rights of property or possession are infringed, whether relating to land, or to chattels, and (3.) trespass to the person (leaving aside highway accidents) I believe it to be true to say that, when the defendant does a particular act and harm results, liability arises only if the likelihood of that result to somebody ought to have been foreseen. The farmer may keep his cattle, if he does not let them cross his neighbour's boundary; the Zoological Gardens may keep their tiger, if they do not let it get loose; the owner of a dog which has already had its one bite may still keep it, if he does not let it bite a second person. In all of these cases the strictness of the rule of duty may be justified on the ground that the defendant was the person who had it in his power to prevent harm, and as a prudent, reasonable man ought to have foreseen the likelihood of harm if he let the harmful things escape from his control. If the defendant does so allow his control to lapse, it is his voluntary act, whether of commission or omission, which causes the plaintiff's damage. So the *Rylands* of to-day may maintain on his land his reservoir of water artificially introduced on his land, if he does not let it escape. As it was the act of the defendant for which our early law put him in peril, so it has continued in most, if not all those actions of tort, enforceable to-day, which do not depend on the moral or quasi-moral characteristics of the defendant's conduct, such as malice, intent or negligence. Other considerations arose of course where contract enters in, as in bailment, or the custom of the realm, as in the case of innkeepers, or common carriers. In those special relationships the law fixes on the defendant a positive duty to keep safe the chattel entrusted to his possession by the plaintiff, and creates a cause of action for a failure, i.e., for an act of omission, because there is a pre-existing duty; but the "activity" of the defendant is only relevant historically, in that it explains how the rule of law grew up. The substantive rights of action which English law recognizes to-day do not justify the wide American proposition as applied to existing law; nor is light thrown on them by it. I know of no generic rule of English law which imposes on a person carrying on a dangerous activity, whether it be positively, comparatively or superlatively dangerous, a liability to all and sundry who happen to be damaged in person, chattels or land, merely because the activity was dangerous. I believe that in every recorded case where the plaintiff has been able to recover without proof of actual negligence, there will be found some definite ground of liability over and above that of "dangerous activity." There are several reasons of principle why it would be wrong to predicate strict liability as attaching to such an "activity": (I.) The rule makes the person who carries on the "activity" an insurer of every person who may be hurt thereby. It would give a right of action not only to all persons outside the premises where the activity is carried on, but also to all persons inside the premises, whether servants, or strangers coming there as invitees, or perhaps even as licensees, unless they had by contract or the doctrine of volenti agreed to take the risk. Common employment, be it observed, would be no defence to an action by a servant, because ex hypothesi, the action would not be based on the negligence of a fellow servant ; and such an extension of the ambit of liability is, alone and of itself, in my opinion a conclusive reason why a judicial decision adopting it would exceed the recognized limits of judicial jurisdiction to "legislate." In other words it shows that the American proposition is not wholly consonant with English law. (2.) As that proposition purports to put the defendant under strict liability for every consequence in fact resulting from the escape of the mischievous thing, it follows that, however long the chain of causation may be in time or space, the ultimate sufferer will have his cause of action equally with the first, for the doctrine of remoteness of damage has no relevance. This does not logically disprove the supposed general principle, but it ought to make us think twice about it. (3.) There are many extra-hazardous activities in civilized life, many more to-day than there were when the common law rules of strict liability took shape ; but although at the back of the judicial decisions, out of which our common law gradually grew, there always was the contemporaneous view of public policy in the minds of our judges, yet there has emerged no such general view of legal responsibility universally attendant upon every ultra-hazardous activity. Coal mining always was, and even to-day still is, with all the safeguards of modern science and statutory regulations to ensure safety, an ultra-hazardous activity. On that the annual statistics of injuries are conclusive. So also are the multitude of manufacturing businesses and public utilities, yet there is no decision recorded in any of the common law reports, however ancient or however modern, that the conduct of any one of those extra-hazardous activities was ever thought to involve, of itself and without any other ground being present, a liability for harm incidentally caused by the activity. Nor is there any hint of any recognition by Parliament in its Coal Mines Regulation Acts, or Factory Acts, of any such liability at common law as would have existed if the wide principle formulated in s. 519 of the " Restatement " had been English law. On the contrary innumerable statutory duties have been imposed by

Parliament as new safeguards, which would, on that hypothesis, have been merely declaratory of the common law, or at least would have been expressed differently. Perhaps a sufficient answer to Mr. Paull's invitation to us to hold that the naked proposition of s. 519 is English law, is that the judges must leave something for Parliament still to do.

In any case it is futile to discuss the primary American proposition unless we, at the same time, consider the American qualifications of it. Of those I have quoted two which are germane to, and have been discussed in connexion with, the *Rylands* v. *Fletcher* (1) principle of "strict liability." The second of them, at any rate, I should be disposed to regard as consistent with English law, and applicable to the facts of the present case, if they are (as I incline to think) distinguishable from the facts in *Rainham Chemical Works, Ld.* v. *Belevedere Fish Guano Co.* (2). The first is the condition that to entail such "strict liability" the ultrahazardous activity must not be a "matter of common usage." (Section 520 (*b*).) That is akin to the second aspect of the rule in *Rylands* v. *Fletcher* (1), which received emphasis from Lord Cairns in the House of Lords, namely, that the user of the land must be "non-natural." Where to draw the dividing line between "natural" and "non-natural" may usually be easy in wild moorland or even land under agriculture; but to draw it in an urban area, and a fortiori in an industrial area, would seem to me in its nature a difficult task of legal definition. The solution, however, of that problem has to-day in English law to be achieved within the limits of decided cases, and I do not think this court can properly discuss it in the present case. The topic belongs, anyhow, to Mr. Paull's alternative argument, i.e., the second qualification, whether if the defendant company was "acting in pursuance of a public duty as a public officer" (see s. 521) it has a direct bearing on the present appeal, if it is consonant with English law. The point was not put quite in that form by counsel for the defendants, but it was involved in the plea and argument that the defendant company was a mere agent of the Minister. It was certainly involved in our consideration of the argument for the plaintiff. If the major submission of Mr. Paull, in terms of s. 519 of the American "Restatement of the Law of Torts" were held to be English law, the question would arise whether s. 521 is a good answer to

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1921] 2 A. C. 465.

it. The defendant company, in doing everything it did, was in my opinion performing a public duty. I arrive at that conclusion by considering both what its functions were and in what capacity it was acting. The governing circumstance was its relationship to the Minister of Supply, as defined by the agreement of January 29, 1942, but regard must also be had to war-time statutory duties imposed on it and all persons working within the factory, whether for the purpose of operating the activity there carried on, or for inspection, as in the case of the plaintiff. Taking all the facts into consideration, if s. 519 were English law I should hold that the company was a "public officer performing a public duty," to use the American expression; so that no liability would attach in respect of the "ultrahazardous activity." But if, as I hold, s. 519 is not sufficiently consistent with English law to entitle the plaintiff to hold her judgment, it will be necessary to reconsider the applicability of the defence afforded by s. 521, after considering her claim to hold the judgment under what is English law.

I therefore come to the alternative contention for the plaintiff, that apart altogether from the wide American proposition about ultrahazardous activities, she is entitled to judgment on the ground that the case is covered by the principle of *Rylands* v. *Fletcher* (1). The argument in support of it is that it is an error to regard the duty to prevent an escape, on which the strict liability of *Rylands* v. *Fletcher* (1) rests, as limited to an escape from the defendant's land. It happened in that case, said Mr. Paull to be such an escape, but the real principle is escape from the defendant's control; if that happens, he says, whether the harm is done inside or outside the defendant's land does not matter, the liability accrues. That contention, he submits, is well-founded in regard to every one of the similar causes of action grouped together in the passage of the judgment of Blackburn J. which was expressly approved in the House of Lords. But that common feature is not enough to establish liability. It may be true that in every one there was escape from control, but it does not follow that that feature was in each case the ratio decidendi, or that no other concomitant fact was needed to entitle the plaintiff to judgment. Escape from control was a link in the chain of causation which ultimately led to the mischief for which the plaintiff sued. It was thus one material fact in establishing the plaintiff's case, but that fact alone, although material as a link, was not the real

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

ground of the defendant's liability. In everyone of the torts in the group it was only, at the highest, one of the facts material to the cause of action, in the sense that, without it, liability would not have resulted. His appeal to the other causes of action in the list of Blackburn J. does not help Mr. Paull and therefore they are neutral for the purpose of his argument. There is, indeed, another feature common to them all which comes much nearer to the legal reason for liability, but does not create it, namely, that the harm to the plaintiff was a probable consequence of the defendant's act, which he knew or ought to have known was likely to occur to anybody in the position of the plaintiff, and therefore ought to have foreseen. This feature on the one hand may often, or possibly in one sense always, be a sine qua non of liability in tort (for intent and malice are merely, so to speak, intensifications of that fore-knowledge) ; but on the other hand, even fore-knowledge, not amounting to negligence, does not, alone and of itself, suffice in English law to create liability ; some other feature is needed, such as an interference with a definite right of the plaintiff, or a failure by the defendant to discharge a positive duty to the plaintiff, a failure which may take the form either of negligence, or intent, or malice or dishonesty. It is the combination with actual or presumed fore-knowledge of the probable result of other features, differing from tort to tort, which gives birth to the cause of action. This fore-knowledge of the defendant as a common aspect of torts was brought out with illuminating clearness in the third and fourth lectures in Holmes' Common Law over sixty years ago, which he began thus : " The object " of the next two lectures is to discover whether there is any " common ground at the bottom of all liability in tort, and if " so, what that ground is. Supposing the attempt to succeed, " it will reveal the general principle of civil liability at common " law." His phrase " the general principle " does not, of course, mean that its presence suffices to constitute every different cause of action in tort ; he means that it is a common characteristic present in all torts. On pp. 79 and 80 he states the opposing views to which I have referred, that the actor acts at his peril (what Holdsworth at p. 446 in vol. VIII. calls " the principles of the medieval period," versus Austin's moral view), and finds his via media in the duty of foresight measured by the prudent, reasonable and normal man. It is unnecessary for this judgment to discuss his reasoning in detail, but I have particularly in mind pp. 88 to 94, 102, and 103, where he speaks of the principle of *Rylands* v. *Fletcher* (1) being " derivative " from " the liability for animals " (meaning there, I think, " cattle-trespass "). On pp. 104 to 107 he explains how his canon of the foresight of the prudent reasonable man was developed by our courts out of the competing claims of the medieval principle and moral culpability. On pp. 116 and 117 he again refers to *Rylands* v. *Fletcher* (1), and there discusses cattle-trespass. At pp. 125 and 126 he discusses the growth of law through judicial regard to " the existing average " standards of the community." On p. 146 he finds his basis of classification of torts " so far as tradition has not swerved the " law from a consistent theory," " in knowledge of circum- " stances accompanying an act or conduct indifferent but for " those circumstances." At p. 154 he discusses the strict liability attaching to animals known to be dangerous, pointing out that " usually there is no question of negligence in guard- " ing the beast," adding, " It is enough in most, if not in all " cases, that the owner has chosen to keep it. Experience has " shown that tigers and bears are alert to find means of escape, " and that, if they escape, they are very certain to do harm of " a serious nature. The possibility of a great danger has the " same effect as the probability of a less one, and the law throws " the risk of the venture on the person who introduces the peril " into the community." On p. 158 after discussing the circumstances in which liability may attach to one who rides an unruly horse and citing *Hammack* v. *White* (2), which deals with the principle of no liability without scienter, he in effect leaves open the question what is " the true explanation of the " rule applied in keeping tigers, or the principle of *Rylands* v. " *Fletcher* " (1).

The reason I have referred to Holmes' analysis at length is not only that his research had great influence on English legal thought, and that it throws much light on the questions of principle raised by the present appeal, but that we get his mature reaction to *Rylands* v. *Fletcher* (1) decided in the House of Lords thirteen years before he wrote his lectures. There is no hint that he regarded the decision as introducing any such far-reaching innovation in our law as Mr. Paull contends it did. Holmes' principle does not go anywhere near to deciding this appeal, for it does not purport to be more than one ingredient in tortious liability. To complete any cause of action in any one of Blackburn J.'s list of torts, some further ingredient is needed over and above escape from control and over and above fore-knowledge by the defendant of the likelihood of harm resulting from his act. To test my general proposition it is necessary to consider each tort in that list separately ; and I will leave *Rylands* v. *Fletcher* (1) to the last. Cattle " trespass " is the simplest, for that grew up out of the idea that the defendant was a trespasser through the action of his cattle. It is so treated as late as 1868 by Bullen & Leake (3rd ed., at p. 416). The gist of the action was and is the damage done to the plaintiff's land, for the herbage eaten is vesture of the land, and real or corporeal property ; (see notes on p. 416 of Bullen & Leake, last paragraph). It was the injury to the plaintiff's land for which the court gave relief, and the ground of the relief was that the defendant's act was an interference with a positive right of the plaintiff, namely, his right of property. In the case of the escape of either noxious fumes or filth there is a breach of the duty of " vicinage " as Kent's Commentaries, edited by Holmes (vol. III., p. 436, note (*b*)), adopting the nomenclature of the civil law, called the duty of a landowner to his neighbour, because there was an escape from the defendant's land, which did damage on the plaintiff's land. The view of the common law was simply that the defendant owed to the plaintiff a positive duty not to interfere with his right of property, and we should remember that, as against the trespasser or other infringer, the plaintiff's right of possession was as good as a right of property, unless the defendant could set up a title in himself : (see Bullen & Leake, pp. 415 to 418), and *The Winkfield* (2). In each case the infringement and the damage constituted an actionable nuisance, because it was the plaintiff's *land* which was damaged. I accept Professor Winfield's definition of it at the beginning of his chapter on nuisances, (see s. 129, p. 476, 2nd ed.), " as unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it."

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(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) (1862) 11 C. B. (N. S.) 588.

This principle is illustrated by such cases as *Bamford* v. *Turnley* (3) (fumes from brick works) ; *St. Helen's Smelting Co.* v. *Tipping* (4) (fumes from smelting works), and *Hodgkinson* v. *Ennor* (5) (water pollution). The decision in *In re Williams* v. *Groucott* (6), was also based on the principle of infringement of the plaintiff's right. A., the original owner of the surface and minerals, sold the minerals to B., who made a shaft, worked them out, and left the place without fencing the shaft. A.'s cattle fell in. Blackburn J. said (1): " When a party " alters things from their normal condition so as to render them " dangerous to already acquired rights, the law casts on him " the obligation of fencing the danger, in order that it shall not " be injurious to those rights."

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(1) L. R. 1 Ex. 265 ; L. R. 3 H. L. 330.

(2) [1902] P. 42.

(3) (1862) 3 B. & S. 66.

(4) (1865) 11 H. L. C. 642.

(5) (1863) 4 B. & S. 229.

(6) (1863) 4 B. & S. 149.

In the case of dangerous animals (in either category) the liability rested and still rests only on a positive rule of public policy, so long enforced by the courts that it is now a part of our substantive law: see my previous quotation from Holmes, p. 154. I have little doubt it is the practical certainty of harm which historically was the judicial basis for that liability.

I have now to examine *Rylands* v. *Fletcher* (2) itself. From my analysis of the other torts it is apparent that its cause of action resembles cattle trespass and nuisances of filth and fumes much more closely than it resembles the liability for dangerous animals. Indeed it possesses one feature definitely common to cattle trespass and nuisance, namely, that it is the damage to the plaintiff's land for which the action accrues. On the facts of the case itself there was an interference with an existing proprietary right of the plaintiff, namely, his right to the enjoyment of his mine free of interference from water which would never have invaded it unless it had been artificially impounded by the defendant at a level from which, given the existence of an underground communication, it was bound to gravitate into the plaintiff's mine. That is how the case is treated by Bullen & Leake, at p. 365 of their third edition, which was published two years after *Rylands* v. *Fletcher* (2) was heard in the Exchequer Chamber, but probably was sent to the printer before July, when the appeal was heard in the House of Lords. That page begins with a count in trespass, then passes to cases of interference with the natural right of support, and of the wrongful removal of barriers, and continues thus: " By the owner of a mine against the owner of an " adjacent mine for pumping up the water higher than the " natural level, whereby it flowed into the plaintiff's mine": *Baird* v. *Williamson* (3), and see *Smith* v. *Kenrick* (4), *Fletcher* v. *Rylands* (2), *Westminster Brymbo Coal Co.* v. *Clayton* (5).

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(1) (1863) 4 B. & S. 149.

(2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(3) (1863) 15 C. B. (N. S.) 376.

(4) (1849) 7 C. B. 515.

(5) (1867) 36 L. J. (Ch.) 476.

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In *Baird* v. *Williamson* (1) the plaintiff recovered judgment because the defendant had pumped the water up to a level higher than its natural level and so caused it to flow into the plaintiff's mine. In *Smith* v. *Kenrick* (2), the plaintiff failed simply because the defendant had not altered the natural flow of the water, and so had not interfered with any proprietary right of the plaintiff. It is significant that *Fletcher* v. *Rylands* (3) was quoted in that category of declarations and in no other. The fact is the more interesting that by alphabetical chance the very next page is concerned with counts for damage done by mischievous animals, and the learned authors point out over the reference to *May* v. *Burdett* (4) that: " Negligence " of the defendant in keeping the animal insecurely is no " part of the cause of action, and need not be stated in the " declaration."

Mr. Paull's argument was so well put, and is so far-reaching, that I have felt bound to give it a full investigation, perhaps too full. But for the reasons I have just given I am satisfied that the principle of *Rylands* v. *Fletcher* (3) is limited, as the Solicitor-General and Mr. Valentine Holmes both contended, to the case where the escaping water passes from the defendant's land on to the plaintiff's land and there does damage. That escape from his control is a purely neutral fact, except evidentially as a link in the chain between first cause and last effect. It is not a feature of the defendant's conduct which, of itself, attracts any legal liability to the plaintiff. The vital feature in *Rylands* v. *Fletcher* (3) which gave the plaintiff his cause of action was the defendant's interference with the plaintiff's right to enjoy his land without interference by the defendant. It was just that, and nothing else, which distinguishes the case from *Smith* v. *Kenrick* (2), and brought it into line with *Baird* v. *Williamson* (1). That characteristic of itself rendered it unnecessary in law to allege and prove negligence. The same observation applies to the action of conversion or trover (See Bullen & Leake, at p. 290). To extend the plaintiff's right of action defined in *Rylands* v. *Fletcher* (3) so as to embrace a case like the present on grounds of public policy in my opinion would be beyond the power of judges. It is matter for Parliament if it is thought desirable. The law is too clearly limited to-day for such judicial legislation. I respectfully agree

(1) (1863) 15 C. B. (N. S.) 376.

(2) (1849) 7 C. B. 515.

(3) L. R. 1 Ex. 265; L. R. 3 H.L. 330.

(4) (1846) 9 Q. B. 101.

with the dictum of Lindley L.J. in *Green* v. *Chelsea Waterworks Co., Ld.* (1), quoted by Lord Wright in *North Western Utilities, Ld.* v. *London Guarantee and Accident Co.* (2) : " That " case is not to be extended beyond the legitimate principle " on which the House of Lords decided it. If it were extended " as far as strict logic might require, it would be a very " oppressive decision."

It is not necessary, in my opinion, to discuss the many cases cited to us on both sides, although I have considered all of them with care. The classification of cases of strict liability in Professor Winfield's book on " The Law of Tort " seems to me logically admirable. I would only add two comments. I doubt whether the law about " Dangerous Operations," his last head, has been sufficiently developed to constitute a clear class by itself. The two cases there included, do not, in my opinion, throw light on the present appeal. A difference in the degree of care required in fact, in different circumstances, from the prudent, reasonable man is not a difference of kind in law. I mention this point, because those cases were pressed on us by Mr. Paull. The present case is nearer to the heading of " Dangerous Structures " in Winfield on the principle of *Indermaur* v. *Dames* (3) ; though there may be a question, whether the appellants were " occupiers " within the meaning of that rule. It is common ground, however, that whatever the degree of care needed, there was no such want of care in the present case as would attract liability to the defendant company under that rule of law. Even on the assumption (which I do not accept) that the defendant company were potential tortfeasors, I should still feel doubts about their liability because of the second of the defences stated in the American " Re- " statement of the Law " (that the main rule does not apply to a person performing a public duty as a public officer). I should have been disposed to think that that defence would have applied, on the exceptional facts of this case, to prevent a cause of action arising, but for the fact that Sir John Simon, as he then was, put a similar point in the forefront of his argument for the defendants in *Rainham Chemical Works, Ld.* v. *Belvedere Fish Guano Co.* (4), without evoking from the House any support for his submission. If it were necessary, it might be possible to distinguish the facts in the present case from those

(1) (1894) 70 L. T. 547, 549.
(2) [1936] A. C. 108, 119.
(3) (1866) L. R. 1 C. P. 274 ; (1867) 2 C. P. 311.
(4) [1921] 2 A. C. 465.

in the *Rainham* case. The present case seems to me more favourable to the defendants. The agent is often, in tort, equally responsible with his principal for a tort committed, but it is not necessary to discuss the applicability of, and I express no opinion on, that rule here.

Finally there is the extremely important question, looming large in the future, which is relevant to the present appeal, but is not for this court to discuss, as to what are the limits of the rule about " non-natural user " of land. In the *Rainham* case, on the facts there, the House treated the manufacturing of explosives as undoubtedly a " non-natural user " and I do not think we ought to try to distinguish the facts in the present case. In *Rickards* v. *Lothian* (1), Lord Moulton, delivering the judgment of the Judicial Committee said: " It is not every use to which land is put that brings into play " that principle. It must be some special use bringing with it " increased danger to others, and must not merely be the " ordinary use of the land or such a use as is proper for the " general benefit of the community." It is the last line which seems to me to indicate a possibility of a practical approach to a better definition of user than the word " non-natural " or indeed of any of the other epithets that have been used, with due regard to the changes in the character of industrial and other operations since 1868.

In the result I hold that the particular doctrine of strict liability laid down in *Rylands* v. *Fletcher* has no application to accidents incidental to the process of manufacture occurring to persons present on the premises, whether as servants or as invitees or licensees. The consideration that the liability would attach to all servants without the possibility of the employer pleading the defence of common employment is, I think, very important, because it would make them absolute insurers in such a case as the present. On the second issue, that of volenti non fit injuria, I decide nothing as in my opinion the respondent had no cause of action; but I doubt the applicability of that defence to persons employed under the regime of the Essential Work Order. The appeal must be allowed with costs here and below.

MACKINNON L.J. The plaintiff, having been injured owing to the explosion of a shell within the factory managed by the defendants, claims to recover damages from them, although

(1) [1913] A. C. 263, 280.

that explosion occurred without any negligence on the part of the defendants or their servants. Whether she can so recover depends upon the answer to three questions: (1.) whether the plaintiff can assert that the defendants are liable under the principle laid down in *Rylands* v. *Fletcher* (1); (2.) whether the use of the factory by the defendants was a non-natural user of the land on which the factory stood, within the enunciation of the principle of *Rylands* v. *Fletcher* (1) in the House of Lords; (3.) whether, if the plaintiff would otherwise be entitled to recover she is debarred by the operation of the principle embodied in the maxim volenti non fit injuria.

Of these three questions the first is by far the most important. The second and third can, in my view, be very shortly dealt with. As to the second in *Rainham Chemical Works, Ld.* v. *Belvedere Co.* (2), which was a similar action against the occupants of an explosives factory, the opening argument for the appellants was that in time of war the use of land for manufacturing explosives was not a non-natural user of the land within the principle laid down in *Rylands* v. *Fletcher* (1). Lord Buckmaster said (3): "in the present case the use ". . . . for the purpose of making munitions . . . . was "certainly not the common and ordinary use of the land." The other Lords do not seem expressly to deal with the point, but they all impliedly reject this part of the appellant's argument. In my view, therefore, this second question must be answered in favour of the plaintiff by reason of the *Rainham* (2) case as an authority by which we are bound. As to the third question, inasmuch as the plaintiff was in effect ordered to work in this factory by the Ministry of Labour, I think she cannot be held to be "volens" within the maxim volenti non fit injuria. It was argued for the defendants that though she may not have been "volens" at the time when she began to work in the factory she was subsequently offered the chance of being moved to another part of the premises, some distance away there to do at a lower wage, at least for a time, clerical work; and as she did not accept this offer it was said that henceforth she must be taken to be voluntarily continuing to work in the factory with its attendant dangers. I do not think this argument should prevail. The plaintiff became a worker in the factory under compulsion. When she had acquired that status I do not think a subsequent incident could rid her of it, unless

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(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1921] 2 A. C. 465, 467.

(3) Ibid. 471.

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it was clear that the compulsion was entirely withdrawn, and she re-entered employment with the defendants purely as a volunteer. If half an hour before the explosion had occurred her foreman had said : " If you like you can go home to lunch " now," and she had replied : " Thank you, but I had rather " wait for an hour, my lunch won't be ready if I go now," I do not think that incident would have availed the defendants, if they were otherwise liable for the injury to her by the explosion, to escape on the plea volenti non fit injuria. The incident about changing the sort of work, and the place for doing it, seems to me to be in kind of the same description. So that I think question three also falls to be answered in favour of the plaintiff.

The first and main question is of far-reaching importance. There is not the least doubt that in the classic judgment of Blackburn J. in *Fletcher* v. *Rylands* (1), he enunciates the principle as being that of one who having brought on his land something which will do damage if it escape from his land, is liable to a person who is injured in his person or property by that escape. The words " escape " and " escaping" are repeated some ten times, and the same idea is repeated in other language, " harmless to others so long as it is confined to his " own property " and " the damage which ensues if he does " not succeed in confining it to his own property." So, when he cites the analogy of a person keeping a mischievous animal he quotes Lord Hale, " he must at his peril keep him up safe " . . . . if he escape and do harm the owner is liable to answer " damages." In *Rylands* v. *Fletcher* (1) in the House of Lords there were apparently only two Lords present. Lord Cairns L.C. (2) seems to repeat the reasoning of Blackburn J., perhaps with the additional qualification that the bringing on his land by the defendant of the source of danger must be a non-natural user of that land. But he speaks of the defendants' liability if " the water came to escape and to pass off " into the close of the plaintiff," and repeats in extenso the passage in the judgment of Blackburn J. to which I referred above as the classic exposition of the doctrine of *Rylands* v. *Fletcher* (1). There can be, in my opinion, no doubt that that doctrine as so enunciated was limited to the operation of the source of danger brought by a plaintiff on his land, if it caused damage outside the limits of his land to the person or property of a neighbour.

(1) L. R. 1 Ex. 265, 279, 280, 281.

(2) L. R. 3 H. L. 330, 339, 340.

Mr. Paull in his very able and exhaustive argument has sought to convince us that this was no necessary limitation to the doctrine, and that such a defendant is equally liable to one who has suffered from the source of danger operating within the bounds of the defendant's land. There is no reported case which so decides, but Mr. Paull said that there are cases from which such a principle can be, and ought to be deduced. So far as I know there is only one reported case in which a plaintiff has sought to rely on the proposition now advanced by Mr. Paull, namely in *Howard* v. *Furness Houlder Argentine Lines, Ld. & A. & R. Brown, Ld.* (1). The argument was there adduced, and is in terms stated, and rejected, by Lewis J. (2). If we are to dismiss this appeal I think we must say that that passage in the judgment of Lewis J. was erroneously decided.

In the absence of any case on the point, Mr. Paull sought to rely, by way of argument, on two passages from text books, (1.) a passage in a text book by a living writer (Dr. Charlesworth on the Law of Negligence, at p. 219), and (2.) a passage in the American "Restatement of the Law." Of the former it is true that it is very nearly in the words of Mr. Paull's argument, but the question remains whether that argument is sound. As to the latter, with all respect to the authors of it, the proposition seems to me so vague and general in its terms as to be more akin to the enunciation of a moral generalization than the precise definition of a principle of law. It is akin to the general words used by Lord Cranworth in *Rylands* v. *Fletcher* (2): "When one person, in managing his own affairs "causes, however innocently, damage to another, it is obviously "only just that he should be the party to suffer." If that were taken literally as providing a rule of law it is obvious that the elaborate discussion of liability in tort in innumerable cases was quite unnecessary, for example, in the analysis of the duty to an invitee, a licensee, or a trespasser, as the case may be.

There remains the question whether, as Mr. Paull argues, the implications of cases subsequently decided, have made obsolete and ineffective the limitations which, as I think clearly, were imposed by Blackburn J. and the House of Lords in enunciating the principle of *Rylands* v. *Fletcher* (3). I do not think it is necessary to go through and examine all the cases cited to us. It is enough, I think, to point out that they are not in terms directed to a re-examination of the principle of

(1) [1936] 2 All E. R. 781.
(2) Ibid. 786.
(3) L. R. 3 H. L. 330, 341.

Rylands v. *Fletcher* (1), and in some of them that case is not mentioned either in argument or judgment. Examples of this are *Grayson* v. *Ellerman Line, Ld.* (2) and *Honeywill and Stein* v. *Larkin* (3). But it is said that propositions laid down in these cases, or some of them, if applied to *Rylands* v. *Fletcher* (1) involve an extension of the principle of that case so as to do away with the limitation of " escape." This, I think, is not a legitimate use of precedent. A judge's observations in any case, perhaps in general terms, must be considered in the light of the particular facts, and the particular problem he is confronted with in the case he is deciding. They ought not to be relied on as the enunciation of general principles applicable to the facts and problems involved in other cases, which he has not envisaged at all. This is a truism which is nowhere expressed more aptly than in the wise words of Lord Halsbury in *Quinn* v. *Leathem* (4). " Every judgment must be read as applicable to " the particular facts proved, or assumed to be proved, since " the generality of the expressions which may be found there " are not intended to be expositions of the whole law, but " governed and qualified by the particular facts of the case in " which such expressions are to be found . . . . A case is " only an authority for what it actually decides. I entirely " deny that it can be quoted for a proposition that may seem " to follow logically from it. Such a mode of reasoning " assumes that the law is necessarily a logical code, whereas " every lawyer must acknowledge that the law is not always " logical at all."

My conclusion is that the learned judge came to a wrong conclusion in this case, and that, as a result, this appeal should be allowed.

DU PARCQ L.J. In his work on the Law of Torts, Sir Frederick Pollock posed the question " whether an action " lies against me for harm resulting by inevitable accident from " an act lawful in itself, and done by me in a reasonable and " careful manner." He defined " inevitable " as meaning " not avoidable by any such precautions as a reasonable man, " doing such an act then and there, could be expected to take." " It may seem," he wrote, " to modern readers that only one " solution of the problem thus stated is possible, or rather that " there is no problem at all. No reason is apparent for not

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(1) L. R. 3 H. L. 330, 341.
(2) [1920] A. C. 466.
(3) [1934] 1 K. B. 191.
(4) [1901] A. C. 495.

" accepting inevitable accident as an excuse." (See 13th ed., pp. 140, 141.) When the question which has been discussed so fully at the Bar was first propounded to us, there was some temptation to believe, with Sir Frederick Pollock's modern readers, that there was no problem at all. The instances in which, although negligence cannot be alleged, an action lies for injury resulting by accident from another's lawful act, are few, and by now, it may be thought, fairly well defined. There can be no doubt, of course, that a manufacturer of explosives, which he knows to be dangerous, is under a duty to take a high degree of care, but I had supposed it to be well settled that, if he fulfilled that duty, he would not be liable to any person using his premises for the consequences of an accidental explosion. We have heard, however, an ingenious and serious argument from Mr. Paull in favour of the view that liability exists in such a case, and there is before us a carefully reasoned judgment of Cassels J., who, at the trial, accepted Mr. Paull's submissions. Clearly, therefore, the question deserves full consideration and is not to be disposed of summarily.

The argument for the plaintiff is based on *Rylands* v. *Fletcher* (1) or, to speak more accurately, on a general proposition of which *Rylands* v. *Fletcher*, in Mr. Paull's words, is to be regarded as " one facet." I need not set out the general proposition at length. It will suffice to say that, if it were accepted, the defendants would be held liable because they were engaged in " an extra-hazardous activity," and because, although they took the utmost care to prevent injury to the plaintiff, she was in fact harmed by the miscarriage of that activity. Mr. Paull did not suggest that any authority could be found which distinctly supported his wide proposition. He submitted that it followed logically from *Rylands* v. *Fletcher* (1), and that it was deducible, or very nearly deducible, from certain dicta to be found in other cases, particularly in some of those dealing with fierce animals. In order to appreciate the full import of the rule laid down in *Rylands* v. *Fletcher* (1), it is necessary (so runs the argument), to treat as non-essential the references which it contains to " escape " from land, and to the duty of " keeping " on the land things which are dangerous if they escape. The judgment of Blackburn J. it is suggested, formulated, or at least adumbrated, a far more comprehensive principle than has been generally

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

supposed. Historians have explained that Blackburn J., in his classical judgment, established a place in modern law for the application of what has been called the medieval principle of liability. That principle, according to Sir William Holdsworth " can be stated somewhat as follows: a man is liable " for all harm which he has inflicted upon another by his acts, " if what he has done comes within some one of the forms of " action provided by the law, whether that harm has been " inflicted intentionally, negligently or accidentally. A man " acts at his peril." Later, the learned author writes " In our " modern law there are two main classes of cases in which the " medieval principle of liability is still applied. The first is the " case where one man has done an act which infringes his " neighbour's possession of, or right to possess, land or chattels. " The second is the class of cases which, in our modern law, " fall under the rule of *Fletcher* v. *Rylands*." (See Holdsworth's History of English Law, ch. VIII., pp. 446, 465.)

Most lawyers would agree, I think, that the courts in modern times have been vigilant to prevent the " medieval principle " from breaking bounds and invading areas of the law in which it has no place. The doctrine of *Rylands* v. *Fletcher* (1) is properly to be regarded rather as an exception to the general principle that there is no liability without fault than as itself a general rule, and it ought not to be extended readily, even if the extension appears to have a logical foundation. " If it were " extended as far as strict logic might require, it would be a " very oppressive decision," said Lindley L.J. in 1894, with reference to a threatened encroachment which was not, I think, more formidable than that which is now being attempted. (See *Green* v. *The Chelsea Waterworks Co.* (2).) A few months later the case of *Ponting* v. *Noakes* (3) came before a Divisional Court, consisting of Charles J. and Collins J., and the court showed no disposition to extend the rule to cover dangerous things which had not escaped from the defendant's land. On the contrary it was insisted that *Rylands* v. *Fletcher* (1) only referred " to the escape from a defendant's land of some" thing which he has brought there, and which is likely to do " mischief if it escapes " (see Charles J. at p. 294 and Collins J. at p. 287). There is no instance recorded in the reports of any challenge, either successful or unsuccessful, to the interpretation put on the rule in *Ponting* v. *Noakes* (3) until, as recently as

(1) L. R. 1 Ex. 265 L. R. 3 H. L. 330.

(2) 70 L. T. 547, 549.

(3) [1894] 2 Q. B. 281.

1936, that interpretation was re-affirmed and adopted by Lewis J. in *Howard* v. *Furness Houlder Argentine Lines, Ld. & A. & R. Brown, Ld.* (1). Moreover, if the principle for which Mr. Paull contends is indeed part of the law of England, it would seem to have been unaccountably overlooked in many cases. (See, for instance, *H. & C. Grayson* v. *Ellerman Lines, Ld.* (2). It is true that in one respect the doctrine may be said to have been extended, since it has been held to apply not only as between adjacent landowners, but also between parties who have no estate or interest in the soil but only a licence to enjoy the use of it, for example, by laying cables or underground mains. But this extension is not material to the present case, and in general the scope of the rule has been restricted rather than enlarged, so that in 1928 Scrutton L.J. went so far as to say " there are so many exceptions to it that " it is doubtful if there is much of the rule left." The statement of the rule by Sir John Salmond, which Scrutton L.J. then said to be accurate, accords with that in *Ponting* v. *Noakes* (3), and leaves no doubt as to its limited application. (See *St. Anne's Well Brewery Co.* v. *Roberts* (4). Counsel for the plaintiff, recognizing the difficulty of bringing this case within the principle laid down in *Rylands* v. *Fletcher* (5), put forward the suggestion, to which I have already alluded, that *Rylands* v. *Fletcher* was but " one facet " of the wider proposition which he invoked. This is metaphorical language, and it is perhaps permissible to say, adopting the metaphor, that it would be rash to infer the existence of an invisible gem when all that is revealed to us is a fragment alleged to be one of its facets. If we leave aside metaphor, the question is whether Mr. Paull's proposition can be established by logical deduction from *Rylands* v. *Fletcher* (5), and is borne out by the dicta which he cited.

The appeal to logic, against which we have the warning of Lindley L.J. to be on our guard, in my opinion wholly fails. It is to my mind plain that Blackburn J., in the passage which was approved in the House of Lords (5), and is so frequently cited, was not purporting to compile a representative list of " extra-hazardous activities." It is not " extra-hazardous " to keep cows, or to maintain a privy or even a reservoir. Blackburn J. was dealing, as he said, with things which are harmless to others, so long as they are confined to a man's own

(1) [1936] 2 All E. R. 781, 786.

(2) [1920] A. C. 466.

(3) [1894] 2 Q. B. 281.

(4) 140 L. T. 1, 6.

(5) L. R. 1 Ex. 265, 280; L. R. 3 H. L. 330.

property, and was not considering at all the rights of those who have entered upon premises on which there are dangerous chattels. But, it is said, the judgment went on to deal with animals ferae naturæ, and a man who keeps a wild beast is liable for injuries which it causes to a person on his land. That is true, but not, I think, with respect, much to the point. Indeed the argument which Mr. Paull founds on the authorities dealing with ferocious animals needs only to be stated baldly in order that the fallacy which underlies it may become apparent. Reduced to simple terms, it is as follows: he who permits cattle, or sewage, or artificially retained water to escape from his land is liable for damage which is the natural consequence of the escape, though no negligence be proved against him. He is similarly liable if ferocious animals escape from his land, and, in the case of such animals, is held liable, without proof of negligence, for damage which they may cause to another while they are still on his land. Therefore, it is concluded, he must be similarly liable for damage done by those other things which are dangerous if they escape, even though they have not escaped but remain on his land. This argument is, I say, plainly fallacious. It depends for any validity it may seem to possess on the hypothesis, which certainly cannot be maintained, that precisely the same rules are to be applied to straying cattle, dangerous only because of their natural inclination to eat grass, to escaping water, and to wild animals. The truth is that when injury is caused by a ferocious animal to a person who has entered on the land occupied by its owner, it is not, strictly speaking, appropriate, and it is certainly not necessary, to invoke the rule in *Rylands* v. *Fletcher* (1) at all. Sir Frederick Pollock in the work to which I have already referred (at p. 516), writes that the responsibility of owners of dangerous animals is "closely connected with" the doctrine of *Rylands* v. *Fletcher* (1). This is true in the sense that they are both cases in which negligence need not be alleged, but historically their origins are known to be different, and it is not to be assumed that they are in all respects identical. It is indeed demonstrable that they are not. (See the passage to which we were referred by the Solicitor-General at pp. 568 and 569 of Professor Winfield's "Text book of the law of Tort," 2nd ed.). There may be *Rylands* v. *Fletcher* (1) liability without any lack of ordinary prudence on the part of the defendant, but it is difficult to say the same when liability depends on the fact that

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

a dangerous animal has been left at large. In the latter case it is, I think, more accurate to speak of "presumed negligence" (although that phrase is not perhaps a very happy one), than to say that the defendant is liable notwithstanding the fact that he has shown due care. For except in a case of vis major, or of the wrongful act of a third party, or where the injured person has been careless for his own safety, the very fact that the fierce animal has been at liberty to injure the plaintiff may well be considered to raise an irrebuttable presumption of negligence. As the Master of the Rolls pointed out in *Aldham* v. *United Dairies (London), Ld.* (1): "In dealing with questions relating to animals, it must "be borne in mind that an animal is capable of spontaneous action." Dicta collected from cases in which such questions were being considered ought in my judgment to be regarded with extreme caution when one is dealing with inanimate objects, and when the liability which it is sought to establish is wholly independent of negligence or fault of any kind. I do not think that any help is to be obtained from them in this case.

Outside the cases about animals, the strongest dictum which Mr. Paull could cite was that in *Honeywill and Stein, Ld.* v. *Larkin* (2), where this court expressed the opinion (not necessary to the decision) that there was an absolute liability on defendants, who had been given permission to take photographs on the plaintiffs' premises, and had set fire to those premises through the use of a dangerous flashlight. The special circumstances of that case may well have justified that obiter dictum, but I am convinced that the phrase "an obligation . . . . "which was, as we think, absolute," expressing as it does an idea which was not elaborated or developed in the judgment, was not intended to unsettle a doctrine of the common law, as it had long been understood.

One passage in the judgment of Cassels J. shows that he was much impressed (unduly impressed if I may respectfully say so) by certain anomalies which appeared to him to result from a strict reading of the rule laid down in *Rylands* v. *Fletcher* (3). Such apparent anomalies are a necessary consequence of the distinctions which the law is compelled to draw in determining rights which must vary according to the circumstances in which the person claiming the right is placed. Nobody would doubt,

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(1) [1940] 1 K. B. 507, 511.

(2) [1934] 1 K. B. 191, 200.

(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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I think, that, if a ruinous wall adjoining the highway collapses, a person injured by its fall may well find that the existence or extent of his right to compensation will depend on the question whether, at the time of the accident, he was in the road or within the bounds of the land on which the wall was built, and, if the answer is that he was within those bounds, on the further question in what capacity he was there. It is impossible to enter premises occupied by another person without assuming certain obligations, and obtaining certain rights, vis-a-vis that person. The rights obtained are very valuable to an invitee, less so to a licensee, comparatively insignificant in the case of a trespasser, but whatever they may be, it is on them, and not on the doctrine of *Rylands* v. *Fletcher* (1), that he must rely in such circumstances as exist in the present case. In my opinion the plaintiff's statement of claim disclosed no cause of action, and no case was made out against the defendants.

It thus becomes unnecessary to decide whether, if a prima facie case had been made against them, the defendants could have succeeded on their plea that the plaintiff voluntarily incurred the risk. I will add, however, that the argument by no means satisfied me that the judge came to a wrong decision on that point.

In my opinion the appeal should be allowed with costs and the judgment of Cassels J. set aside.

Appeal allowed.

Solicitor for appellants: *Treasury Solicitor.*
Solicitors for respondent: *L. Bingham & Co.*

(1) L. R. 1 Ex. 265; L. R 3 H. L. 330.

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Feb. 1, 2.
Lord Greene M.R., MacKinnon L. J. and Uthwatt J.

AUSTIN v. ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LIMITED.

Insurance—Motor-car—Extension of cover to person driving with insured's permission—Double insurance—Subrogation—Breach of condition—Condition unknown to permitted driver.

The defendant company issued a policy of motor-car insurance to one A., containing an extension clause covering any person driving the motor-car with the insured's permission, provided that such person should, as though he were the insured, observe, fulfil and be subject to the terms, exceptions and conditions of the policy in so far as they could apply. The policy contained a condition that " every letter claim writ summons and/or process " shall be notified or forwarded to the company immediately on " receipt." While the plaintiff was driving the motor-car with A.'s permission, an accident occurred, as a result of which A. died and another person was injured. Actions brought against the plaintiff were settled by his own insurers. In an action by the plaintiff for the benefit of his own insurers, the defendants denied liability on the ground of a breach of the condition set out above, in that the plaintiff had not notified them of summonses issued against him for dangerous and careless driving at the time of the accident. The plaintiff contended that the condition had never been brought to his notice and that he was not bound by it :—

Held, that the principle that a party to a contract is not bound by conditions which are not brought to his notice has no application to the case where a person, who is not a party to any contract, seeks, under a statutory provision, to take the benefit of a document. Such a person must take the document as he finds it, and cannot select those parts which suit him :—

Held, also (per MACKINNON L.J. and UTHWATT J.) that this was a claim for double insurance, not subrogation, and the action should have been brought by the plaintiff's insurers in their own name, and not by him on their behalf.

Richardson, Spence & Co. v. *Rowntree* [1894] A. C. 217 and *In re Coleman's Depositories, Ld. and The Life and Health Assurance Association* [1907] 2 K. B. 798, distinguished.

APPEAL from Tucker J.

On May 23, 1938, the plaintiff Austin was driving, with the consent of the owner, a Lincoln Zephyr motor-car, the property of one Aldridge, when he met with an accident. Aldridge and one Nicholson were passengers in the car at the time of the accident, as the result of which Aldridge died and Nicholson was injured. Actions were brought against the plaintiff by the executrices of Aldridge and by Nicholson. The plaintiff was insured by the Bell Assurance Association (" the Bell association ") in respect of his own motor-car, under a policy which covered him while driving any other private car not belonging to or hired by him, for pleasure purposes. The Bell association undertook the defence of the two actions brought against Austin and settled them for substantial sums. At the time of these settlements, Austin signed the following agreement which was endorsed on counsel's brief : " I agree to the below-mentioned " terms and I agree either to assign to the Bell Assurance " Association such rights as I may have against the Zurich " Insurance Co., and/or to allow them in my name to proceed " against the said Zurich Insurance Co., to recover the whole

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"or any part of the said sums for the benefit of the said Bell "Assurance Association."

The claim was brought against the Zurich General Accident and Liability Insurance Co., Ld., in the following circumstances. The Zurich company had issued to Aldridge a policy, which was in force at the date of the accident, covering, inter alia, third party claims arising out of accidents caused by or through or in connexion with his Lincoln Zephyr car. Cover was by s. 1, para. 1, of the policy, extended to any person driving that car with the insured's permission. That extension, however, was subject to the provisos: (*a*) that such person was not entitled to indemnity under any other policy, and (*b*) that such person should, as though he were the insured, observe, fulfil and be subject to the terms exceptions and conditions of the policy in so far as they could apply. The policy contained certain general conditions, including (inter alia): "1. The insured or his legal "personal representatives shall give notice in writing . . . . "as soon as possible after the occurrence of any accident and/or "loss and/or damage with full particulars thereof. Every letter "writ claim summons and/or process shall be notified or for-"warded to the company immediately on receipt. Notice "shall also be given in writing to the company immediately the "insured or his legal personal representatives shall have know-"ledge of any impending prosecution or inquest in connexion "with any accident for which there may be liability under this "policy. 5. If at the time any claim arises under this policy "there is any other existing insurance covering the same loss "damage or liability the company shall not be liable . . . . "to pay or contribute more than its rateable proportion of any "loss damage compensation costs or expenses. Provided "always that nothing in this condition shall impose on the "company any liability from which but for this condition it "would have been relieved under the provisions of paras. 1 (*a*) "or 2 of s. 1 of this policy. . . . 7. The due observance and "fulfilment of the terms provisions and conditions of this policy "and of any endorsement hereon in so far as they relate to "anything to be done or complied with by the insured and the "truth of the statements and answers in the said proposal shall "be conditions precedent to any liability of the company to "make any payment under this policy."

The Bell association, in settling the actions brought against the plaintiff, did so without prejudice to their contention that they were not liable, and that the plaintiff was entitled to be indemnified by the Zurich company. The plaintiff accordingly brought an action for the benefit of the Bell association, claiming to be indemnified as to the whole, or alternatively, as to fifty per cent. of the payments made by them. The defendants raised a number of defences but Tucker J. found in the plaintiff's favour on all except one—namely, that he had failed to notify the defendants of two summonses against him for dangerous and careless driving on the occasion of the accident, and that by such omission he had failed to comply with cond. 1 of the General Conditions. On that ground only he gave judgment for the defendants. The plaintiff appealed.

Samuels K.C. and *P. M. O'Connor* for the plaintiff. It is submitted that the plaintiff was under no obligation to give notice of the two summonses. He was not the insured, and it would have been the duty of Aldridge—or, since he was dead, of his personal representatives—to give notice. They referred to *Weddell* v. *Road Transport & General Insurance Co., Ld.* (1). *Richardson, Spence & Co.* v. *Rowntree* (2) is an authority for the proposition that if one party to a contract takes no steps to bring to the notice of the other party any conditions limiting his liability, the other party is not bound; *In re Coleman's Depositories, Ld. and The Life and Health Assurance Association* (3) is to the same effect. So in a policy of this sort, a person who is insured under the extension clause cannot be bound by conditions of which he knows nothing. Any other view would make this insurance in the vast majority of cases completely illusory. There is no authority before the Road Traffic Act, 1930, for an action on a policy by an authorized driver, but *Tattersall* v. *Drysdale* (4) following *McCormick* v. *National Motor and Accident Insurance Union, Ld.* (5) shows that the authorized driver has a statutory right to sue. The point is also dealt with by Lord Porter in *Digby* v. *General Accident Insurance Co.* (6).

J. W. Morris K.C. and *Morle* for the defendants were not called on.

Lord Greene M.R. The only question that arises in this appeal is: Has the plaintiff the rights which he claims against the Zurich General Accident and Liability Insurance Company, Ld.? No doubt he is bringing the action because he has been

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(1) [1932] 2 K. B. 563.
(2) [1894] A. C. 217.
(3) [1907] 2 K. B. 798.
(4) [1935] 2 K. B. 174.
(5) (1934) 40 Com. Cas. 76.
(6) [1943] A. C. 121.

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called on to do so by his own underwriters, but that does not alter the fact that the action is his action and the rights to be ascertained are his rights.

[After stating the facts and material terms of the policy, his Lordship continued :] Austin had been served with summonses for dangerous and careless driving. He did not give notice to the Zurich Company of the service of those summonses and, accordingly, looking at the mere language of cond. 1, that condition was not complied with. One would have thought it obvious that that must be an end of the present claim, because one of the terms on which the Zurich company agreed to indemnify an authorized driver was that he should, as though he were the insured, " observe fulfil and be subject " to the terms exceptions and conditions of this policy in so " far as they can apply." There was nothing to prevent the plaintiff giving the notice required by that condition, and I cannot see why it could be said that that particular condition could not apply. One reason why he did not give notice to the Zurich company was that he did not know of the existence of such a condition in Aldridge's policy ; also, having his own policy, he was not interested in anything else. He had his own underwriters, and he does not appear to have troubled his head about the possibility of Aldridge having a policy, or of that policy extending to drivers authorized by Aldridge to drive his car.

It is said that as the plaintiff did not know of that condition in Aldridge's policy, he is not bound by it. It is no fault of Mr. Samuels that I have not understood the grounds on which that proposition can be put forward. His argument was perfectly clear. What I do not understand is how it can support the proposition for which he contended. Here is a case where Austin, a stranger to the policy altogether, paying no part of the premium and not being a party in contractual relations with the Zurich company, seeks to take the benefit of a clause in Aldridge's policy which he can only obtain by reason of a certain statutory provision. I do not think it can be suggested that, apart from statute, any contract could be spelt out in circumstances such as this between Austin and the Zurich company. But, by reason of s. 36, sub-s. 4, of the Road Traffic Act, 1930, Austin had a right to sue the Zurich company. It is sufficient to refer to a passage in the judgment of Goddard J. as he then was, in *Tattersall* v. *Drysdale* (1). The

(1) [1935] 2 K. B. 174, 181.

passage starts with a quotation from Greer L.J. in an earlier case: "But Greer L.J. says: 'I think it is quite clear that "'the section was intended to meet the difficulty that was "'patent; first, that nobody who was not a party to a con- "'tract could bring an action on the contract; and, secondly, "'by reason of the statutory and well-known law that a person "'who has no interest in the subject-matter of an insurance "'cannot claim the benefit of that insurance'." Then Goddard J. goes on: "I read that passage as meaning that in "his opinion the section was not only intended to effect but "has effected a change in the law and gives a cause of action "which hitherto did not exist to a person indicated in the "policy but not a party to it, and I respectfully agree with that "view." Here then is the plaintiff endeavouring to take advantage of the indemnity which Aldridge's policy purports to give to him, and he is claiming a benefit under a document to which he is not a party. I should have thought myself that it was scarcely arguable that a person who claims the benefit of a document in that way is not bound to take it as he finds it. He must take it with all its disadvantages from his point of view, together with its advantages, and he cannot claim the benefit of anything which the document gives him without complying with its terms. I should have thought that that was not merely common sense, but a perfectly clear matter of principle.

In the present case this clause in terms obliges the authorized driver to "observe fulfil and be subject to the terms exceptions "and conditions of this policy in so far as they can apply." There is nothing in those terms which cannot apply. There is nothing which is inconsistent in those terms with the case of the authorized driver. The real weight of Mr. Samuel's argument was to this effect: "Austin cannot be bound by a "condition of which he did not know." It is true that there are numbers of well-known cases in which a party to a contract has been held not to be bound by a condition which was not properly brought to his notice at the time that the contract was made. A case on this point which one remembers from reading it in the elementary text-books on contract is *Richardson, Spence & Co.* v. *Rowntree* (1). The question there was: What were the terms of the contract between the parties? In the circumstances, did the condition in question form part of the contract, or did it not? It was held that it did not,

(1) [1894] A. C. 217.

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because you cannot put on a person a condition which you have carefully concealed—over which, so to speak, you have put a piece of paper while he is signing his name. That is no part of the contract. In the present case there is no question of contract. It is a question of a document which, by virtue of a statute, confers a benefit on a third party. How that third party can pick and choose and take that part of the document which suits him and omit that part of the document which does not suit him, I am at a loss to understand. He must take it or leave it as he finds it, and if he claims the benefit, he must suffer the burden.

There is one case that was relied on, on which I must say a word. That was *In re Coleman's Depositories, Ld. and The Life and Health Assurance Association* (1). That was a case where an employer was minded to effect an employers' liability and workmen's compensation insurance. He signed a proposal form and received a covering note, which made no mention of any conditions which the underwriters would require to be contained in the policy. Before he received the policy, a workman was injured and the employer became under liability in respect of that injury. He did not give notice of the injury because at the time it was not thought to be of any seriousness. The policy was then delivered to him and it contained a condition with regard to giving notice within a proper time of injuries which might occur to the assured's workmen. The question there was whether that condition bound the assured, and the question that had to be decided was simply this: At the relevant time when this accident took place, what was the contract of insurance existing between the assured and the underwriters? Did that condition form part of that contractual relationship or did it not? The answer of the majority of this court was that it did not. The ground of the decision appears plainly from the judgment of Vaughan Williams L.J. (2). He says: " It could not have been in the " contemplation of the parties that this condition as to " immediate notice should apply until the contents of the " policy had been communicated to the employer. I hold that " on the face of the award there is no evidence that the " employer knew, or had the opportunity of knowing, the " conditions of the policy, and that the onus is on the associa- " tion; and in my opinion the risk undertaken by the associa- " tion for the period prior to the delivery of the policy did not

(1) [1907] 2 K. B. 798.

(2) Ibid. 805.

"impose upon the employer the obligation to give immediate "notice of the accident to Corrin on January 2, 1905, prior to "the receipt by the employer of the policy or of information of "its containing such a condition or obligation." The question was: What was the risk undertaken by the association and what were the conditions under which it took that risk? The court held that that particular condition was not embodied in the contract. That seems to me to have no application to the present case. It is very like the other class of case, of which *Richardson, Spence & Co.* v. *Rowntree* (1) is an example. It is a question of: What is the contract between the two contracting parties? Does it, or does it not, contain a particular term?

As I have pointed out, no such contract arises here. There is no contract, but there is a document which the plaintiff, the authorized driver, must take as he finds it. If that be not right, the authorized driver would be exempt from all these conditions. I can see no ground for excluding any of them, and he would be in an extremely fortunate position and the underwriters in an extremely unfortunate position, because the result would be that the benefits conferred on the authorized driver would be far better than the benefits conferred on the actual policyholder himself. It is not to be supposed that, where the policyholder authorizes somebody else to drive his car, the underwriters are in a position to tell that other person what the terms are on which he is going to be indemnified if he does drive the car. It is obviously not business and could never be effectively done. It is worth calling attention to the fact, I think, that, although this particular point was not before the House of Lords in *Digby* v. *General Accident Fire and Life Assurance Corporation, Ld.* (2), Lord Wright, in discussing a similar clause to this, went through the conditions one by one and pointed out those which would affect and bind in their nature the authorized driver. It is true that the point was not before him, but if it had occurred to him that an authorized driver would not be bound by these conditions unless he knew of them, it is clear that he could not have used the language that he did. He treats these conditions as being absolutely binding.

In my opinion, that is the right answer and in the result the appeal must be dismissed.

(1) [1894] A. C. 217.

(2) [1943] A. C. 121, 140.

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MACKINNON L.J. I agree. The judgment of Tucker J. seems to me a masterly and admirable one in which no error can be found. I would only add one thing: This apparently was treated below as a claim by the Bell association against the Zurich company, put forward by virtue of their right of subrogation. If it was a claim in subrogation, it would be rightly pursued in the name of Austin; but, as it seems to me, in truth the claim of the Bell association was one of contribution against the Zurich company on the principle of double insurance, and such a claim ought to be brought in the name of the underwriters against the defendant company and could not be pursued in the name of the assured under the guise of a claim by way of subrogation. However, that is a very technical matter. It does not really concern the merits of this case or of this appeal.

UTHWATT J. I agree. The plaintiff's rights in this case arose only by reason of the fact that Aldridge made a bargain. That being so, he can only claim upon the terms of the bargain which Aldridge in fact made. He is bound by all those terms, whatever they may be. His assent or dissent from any of those terms adds nothing, and, for that reason, it appears to me the railway cases are irrelevant. As regards the question of parties, I agree with what has fallen from MacKinnon L.J. that the plaintiff, having been completely indemnified by one set of insurers, cannot be in a position to ask the other insurers for an indemnity against something in respect of which he has already been fully indemnified. The matter between the two sets of insurers ought to be worked out in proceedings differently constituted.

Appeal dismissed.

Solicitors for plaintiff: *R. I. Lewis & Co.*
Solicitors for defendants: *A. E. Wyeth & Co.*

J. W. H.

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Jan. 11.

Tucker J.

Emergency legislation—Pension—Fireman of mercantile marine—Aggravation of organic disease—Injury caused by hard work, with increased effort in combating the enemy—" War injury "—Injury attributable to conditions abnormal in time of peace—No peril other than such conditions—" War risk injury "—Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 83) *ss.* 3 *and* 10—*Pensions (Mercantile Marine) Act,* 1942 (5 *&* 6 *Geo.* 6, *c.* 26), *s.* 1, *sub-ss.* 1, 2, 3 ; *s.* 5.

The appellant, a fireman in the Mercantile Marine, who suffered from a long-standing organic disease, which had been aggravated by the conditions of his service in British ships, between November, 1940, and June, 1943, and in particular by the effect on the atmosphere in the engine room of the use of fuel oil, applied for a pension in respect of " war injury " within the meaning of s. 10 of the Pensions (Army, Navy, Air Force and Mercantile Marine) Act, 1939. Alternatively, he claimed an award for " war risk " injury " under a scheme made by the Minister of Pensions, under the Pensions (Mercantile Marine) Act, 1942, s. 1, sub-s. 2, of which defines such injury as " physical injuries sustained on or after " September 3, 1939, at sea . . . . and attributable to . . . . " (*d*) the existence on board ship of any other conditions arising " out of any such war as aforesaid which would be abnormal " in time of peace." Sub-section 3 provides that for the purposes of s. 1 an injury " shall be treated as being attributable to the " matters specified in " [paras. (*a*), (*b*), (*c*) and (*d*) of sub-s. 2] " if, but only if, they substantially increased the risk of the peril " occurring which caused the injury." Section 5 declares that the expression " physical injury " includes tuberculosis and any other organic disease, and the aggravation thereof.

The appellant's claim was rejected by a Pensions Appeal Tribunal which held that his injury was not a " war injury " within the meaning of s. 10 of the Act of 1939, and that he was not entitled to an award under the Act of 1942 because, under sub-s. 3 of s. 1 of that Act, it was necessary, in order to support the claim, to establish some peril, the risk of which had been increased by the abnormal war conditions over and above the actual injury which had occurred. On appeal :—

Held, that the appellant's injury was not a " war injury " within the meaning of s. 10 of the Act of 1939, but was a " war risk " injury " falling within s. 1 of the Act of 1942, for where under sub-s. 2 (*d*) of that section the physical injury is attributable to the existence on board ship of conditions arising out of the war which would be abnormal in time of peace, sub-s. 3 does not make it necessary, in order to support an award, to establish the existence of some other peril the risk of which had been increased by such abnormal conditions. In the case of organic disease sub-s. 3 must be read as meaning that an injury must be treated as being attributable to the existence on board ship of conditions arising out of the war which would be abnormal in time of peace, if, but only if, those conditions have substantially increased the risk of injury which occurred.

CASE stated by the chairman of the Pensions Appeal Tribunal No. 1, under s. 6, sub-s. 2, of the Pensions Appeal Tribunals Act, 1943.

James Henry Saffell, the appellant, a mariner in the mercantile marine, was disabled by old lung trouble, probably tubercular in origin, which was aggravated by his employment as a fireman in the engine room of various British ships from November, 1940, until June, 1943. The appellant claimed a pension under ss. 3 and 10 of the Pensions (Navy, Army, Air Force, and Mercantile Marine) Act, 1939 (1),

(1) Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939, s. 10:—" In this Act " the following expressions have " the meanings hereby respectively " assigned to them . . . . ' War " ' injuries ' means physical in" juries—(*a*) caused by—(i.) the " discharge of any missile (in" cluding liquids and gas); or " (ii.) the use of any weapon, ex" plosive, or other noxious thing; " or (iii.) the doing of any other " injurious act; either by the " enemy or in combating the " enemy or in repelling an " imagined attack by the " enemy . . . ."

Pensions (Mercantile Marine) Act, 1942, s. 1—(1.) " Sections 3, " 4 and 5 of the Pensions (Navy, " Army, Air Force and Mer" cantile Marine) Act, 1939 . . . . " shall, as amended by the subse" quent provisions of this Act, " apply in relation to injuries " falling within this section which " are not war injuries as defined " by s. 10 of the principal Act as " they apply in relation to war " injuries as so defined . . . ."

(2) " The injuries falling within " this section are physical injuries " sustained on or after Sep" tember 3, 1939, at sea . . . . " and attributable to—(*a*) the " taking of measures with a view " to avoiding, preventing, or " hindering enemy action against " ships, or as a precaution in " anticipation of enemy action " against ships, or for rescue or " salvage purposes in consequence " of enemy action against ships; " or (*b*) the absence, by reason of " circumstances connected with " any war in which His Majesty " may be engaged, of any aid to " navigation for ships, or of any " warning of danger to ships, being " an aid or warning which would " be normal in time of peace; " or (*c*) the carriage, by reason of " circumstances connected with " any such war as aforesaid, of any " cargo in a manner which would " be abnormal in time of peace " and involves danger to the ship " in which the cargo is carried " or to her crew; or (*d*) the " existence on board ship of any " other conditions arising out of " any such war as aforesaid which " would be abnormal in time of " peace . . . ." (3) " For the " purposes of this section an injury " . . . . shall be treated as being " attributable to the matters speci" fied in " paras. (*a*), (*b*), (*c*) or " (*d*) of sub-s. 2, " if, but only if,

on the ground that his disablement resulted from a "war "injury" within the meaning of that Act and, alternatively under s. 1 of the Pensions (Mercantile Marine) Act, 1942 (1), on the ground that his disablement had resulted from a "war "risk injury" falling within s. 1 of that Act. The claims were disallowed by the Minister of Pensions and the appellant appealed to the Pensions Appeal Tribunal under s. 2 of the Pensions Appeal Tribunals Act, 1943.

The tribunal found that the appellant's disablement was directly attributable to an injury consisting of aggravation thereof, which:

(i.) occurred whilst he was in the service of a British ship as a mariner and was sustained at sea;

(ii.) was caused partly by acts done, that is to say hard work with increased effort, both in combating the enemy and as part of measures taken with a view to avoiding, preventing, or hindering enemy action against ships or as a precaution in anticipation of enemy action against ships, and partly by the existence on board ship of other conditions arising out of the war which would be abnormal in time of peace, that is to say closer atmospheres from fuel oil in the engine room than would be normal in the time of peace; and

(iii.) was not caused or contributed to by the occurrence of any injurious event other than the said work, in combating the enemy and as part of the said measures and other than the existence of the said conditions; and that these matters were not of such a kind as to increase the risk of any other such event occurring; and that no other such event, the risk of which occurring was so increased in fact, did occur or cause or contribute to the injury.

The tribunal held (i.) that the injury was not a "war "injury" within the meaning of the Act of 1939, because the acts and work done by the appellant in combating the enemy, together with the use of fuel oil, even if injurious or noxious

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"they substantially increased the "risk of the peril occurring which "caused the injury . . . ."

Section 5: "For the removal of "doubt it is hereby declared that "the expression 'physical injury' "in the principal Act and in this "Act . . . . includes tuberculosis "and any other organic disease, "and the aggravation thereof."

Pensions Appeal Tribunals Act, 1943, s. 12: "(1.) In this Act the "following expressions have the "meanings hereby respectively "assigned to them: . . . . 'war "'risk injury' means an injury "falling within s. 1 of the Pen-"sions (Mercantile Marine) Act, "1942 . . . . ."

to him in his existing condition, were not injurious acts and did not constitute a noxious thing within the meaning of s. 10 of the Act of 1939..

(2.) that the injury was not a "war risk injury" falling within s. 1 of the Act of 1942, because :

(i.) the harder work done in combating the enemy and as part of the said measures and, similarly, the closer atmospheres from fuel oil did not increase the risk of any peril occurring which caused the injury, because no such peril, the risk of which occurring, if any, was so increased, did in fact occur or cause the injury;

(ii.) the said matters on the facts of this case were not of such a kind as to involve or to increase the risk of any such peril occurring, and as such were not matters of the kind contemplated by s. 1 of the Act of 1942 and could not, therefore, be treated as falling within the matters specified in sub-s. 2 of s. 1;

(iii.) Although the injury was attributable to the matters specified in the case, and even if these matters were specified in sub-s. 2, the injury could not under sub-s. 3 be treated as attributable to those matters, because they did not increase the risk of any peril occurring which caused the injury;

(iv.) the words in sub-s. 3, "if, but only if, they" (the matters specified in sub-s. 2) "substantially increased the risk "of the peril occurring which caused the injury" are inconsistent with treating the matters themselves as specified, or the injury itself, which occurred, as the peril referred to by these words.

Accordingly, the tribunal dismissed the appeal, but stated this case.

Goldie K.C. and *Crispin* for appellant.

Valentine Holmes for the respondent, the Minister of Pensions, in view of the facts found by the tribunal did not contest that the appellant's disablement resulted from a "war "risk injury," falling within s. 1 of the Pensions (Mercantile Marine) Act, 1942.

TUCKER J.: The appellant's first claim is that he is entitled to an award under the scheme made by the Minister of Pensions, on the ground that his disablement resulted from a "war "injury" within the meaning of s. 10 of the Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939. The first words of that definition are: " 'War injuries' means "physical injuries," and by s. 5 of the Pensions (Mercantile Marine) Act, 1942, " physical injury " in the Act of 1939 and in that Act is defined as including " tuberculosis and any " other organic disease." The appellant's injury, therefore, was a " physical injury," but to come within the terms of the definition it must have been caused by one of the specific agencies there mentioned, and it has been contended for the appellant that his injury—the condition of his lungs—was caused by the " use of a noxious thing," or the " doing of any " other injurious act . . . . in combating the enemy." The tribunal, it was said, had found that the appellant's injury was caused partly by hard work, with increased effort in combating the enemy, and that he was subject to closer atmospheres from fuel oil in the engine room than would be normal in time of peace, and that this was also due to measures taken with a view to combating the enemy, and, therefore, his injury was due either to the use of a noxious thing or to an injurious act in combating the enemy. The pensions appeal tribunal have held that this was not a " war injury " within the meaning of s. 10, and in my view that part of their decision was correct. The fact that the ships on which the appellant was engaged as a fireman were using fuel oil in increased quantities, and that this use produced an atmosphere harmful to the appellant in his then condition was not, in my opinion, " the use of a noxious thing or the doing of any other " injurious act . . . . in combating the enemy," within the meaning of s. 10.

The appellant's alternative claim that he is entitled to an award under a scheme made by the Minister of Pensions is based on s. 1 of the Pensions (Mercantile Marine) Act, 1942. By sub-s. 1 of s. 1 the Minister may make schemes for awards in relation to injuries falling within that section which are not " war injuries " as defined by s. 10 of the Act of 1939. By sub-s. 2: " The injuries falling within this section are physical " injuries," which, as I have pointed out, include the appellant's lung condition, " sustained on or after the 3rd day " of September 1939, at sea . . . . and attributable to . . . . " (d) the existence on board ship of any other conditions " arising out of any such war . . . . which would be abnormal " in time of peace." The Minister, therefore, was empowered to make a scheme for awards providing for disablement in the case of the aggravation of tuberculosis or chronic bronchitis sustained on or after September 3, 1939, at sea, attributable to "the existence on board ship of any other conditions "arising out of any such war as aforesaid which would be "abnormal in time of peace."

It has been contended for the appellant that the finding of the tribunal that the appellant's lung condition was caused partly by closer atmospheres from fuel oil in the engine room than would be normal in time of peace entitled the appellant to an award under the extended powers conferred on the Minister by the Act of 1942. The tribunal have also disallowed this claim, but Mr. Valentine Holmes, appearing for the Minister, does not seek to support the decision of the tribunal on this claim, having regard to the facts found by the tribunal, which differ from the facts as found by the Minister when the claim first came before him. Though both counsel agree that the appeal should be allowed on this claim, I must be satisfied that this view is correct, because by virtue of s. 6, sub-s. 2, of the Pensions Appeal Tribunals Act, 1943, my decision in this case will be binding on other tribunals, and the issue involved is one of considerable importance. The pensions appeal tribunal has decided adversely to the appellant on this claim by reason of the terms of sub-s. 3 of s. 1 of the Act of 1942. By that sub-section: "For the purposes of this section an "injury . . . . shall be treated as being attributable to the "matters specified" in paras. (*a*), (*b*), (*c*) and (*d*) of sub-s. 2, "if, but only if, they substantially increased the risk of "the peril occurring which caused the injury." The view taken by the tribunal is that to support the claim there must be found some peril other than the existence of conditions which would be abnormal in time of peace and that these conditions must increase the risk of peril. It is necessary, they say, to support an award, that they should find some peril, the risk of which has been increased over and above the actual injury which has occurred, because the words of sub-s. 3 are not "substantially increased the risk of injury," but "substantially increased the risk of the peril occurring "which caused the injury." There must be found, they hold, a peril which causes the injury over and above the injury itself. This difficulty only arises under sub-s. 3 with regard to the matters set out in para. (*d*) of sub-s. 2. In regard to the matters set out in paras. (*a*), (*b*) and (*c*) of sub-s. 2 it would seem that, of necessity, there would always be some occurrence which would happen and be brought about by the matters enumerated in those paragraphs, which would constitute a peril which would cause the injury, but in the case of para. (*d*) the position is different. Here the sub-section speaks of physical injuries attributable to the existence on board ship of any other conditions arising out of the war which would be abnormal in time of peace. The finding in this case, is that conditions abnormal in time of peace have caused the injury, and the tribunal asks: where is the peril the risk of which must be increased within the meaning of sub-s. 3 ?

In my opinion, the tribunal have taken too narrow a view of the meaning of sub-s. 3. It is plain that the words of the sub-section are not very apt when applied to the matters set out in para. (*d*) of sub-s. 2. But looking at the section as a whole, and the framework of the Act of 1942, and seeing that by s. 5 " physical injury " includes organic disease, I think that in dealing with sub-s. 2 (*d*) in the case of disease, sub-s. 3 must be interpreted as meaning " if, but only if, the " existence on board ship of any other conditions arising out " of any such war as aforesaid which would be abnormal " in time of peace have substantially increased the risk of " the injury which occurred." I am aware of the fact that this interpretation involves ignoring the word " peril " in sub-s. 3, but none the less, looking at the section as a whole I think that where the existence of the conditions themselves constitutes the peril, and that caused the injury, the case comes within sub-ss. 2 and 3 of the section. The construction of the sub-section is not free from difficulty, but to hold otherwise would be to interpret this statute in a way which I cannot think was intended by the legislature. I hold, therefore, that in the case of para. (*d*) of sub-s. 2, it is not necessary to find that there was some peril other than the existence of conditions which would be abnormal in time of peace. The appeal must be allowed.

Appeal allowed.

Solicitors for appellant : *Culross & Co.*
Solicitor for respondent : *Treasury Solicitor.*

C. G. M.

1945
Jan. 24.

Humphreys, Singleton and Croom-Johnson JJ.

BAILEY *v.* HOOKWAY.

Landlord and tenant—Small tenements recovery—Service of statutory notice by landlord or his agent—Meaning of "agent"—Small Tenements Recovery Act, 1838 (1 *&* 2 *Vict., c.* 74), *ss.* 1 *and* 7.

Section 1 of the Small Tenements Recovery Act, 1838, provides that the statutory notice of the landlord's intention to apply to the justices for possession of the premises in the form set out in the schedule to the Act shall be served on the tenant by the landlord or his agent, and by s. 7:—"the word 'agent' shall be "taken to signify any person usually employed by the landlord "in the letting of the premises or in the collection of the rents "thereof, or specially authorized to act in the particular matter "by writing under the hand of such landlord." Solicitors, who did not come within one of the two first specified classes, served the statutory notice under s. 1 of the Act on behalf of the landlord, but they were not "specially authorized to act in the particular "matter by writing under the hand" of the landlord:—

Held, that s. 7 defined the classes of persons who alone were entitled as the landlord's agent to serve the statutory notice, and the notice was therefore invalid.

CASE stated by Devon justices.

Walter Hookway, the landlord, applied to a court of summary jurisdiction sitting at Great Torrington, in the county of Devon, under the Small Tenements Recovery Act, 1838, to issue their warrant directing constables to enter and take possession of a tenement known as Sunnyside, Kingscott, in the parish of St. Giles in the county of Devon, held and occupied by Evelyn Bailey, the tenant, and to eject any person therefrom.

At the hearing on July 8, 1944, it was proved, inter alia, that on June 26, 1944, one Leonard Stanley Hutchings, a clerk of Messrs. S. A. Copp & Son, served on, and read over and explained to, the tenant, a written notice in these terms:—

"County of Devon (to wit) We, Messrs. S. A. Copp and Son "of Castle Chambers, Barnstaple, solicitors and agents for "Walter Hookway the owner do hereby give you notice that "unless peaceable possession of the tenement Sunnyside, "Kingscott . . . . which was held of the said Walter Hookway "under a tenancy from year to year, which was determined by "notice to quit from the said Walter Hookway on June 24, "1944, and which tenement is now held over and detained "from the said Walter Hookway be given to him, the owner, "on or before the expiration of seven clear days from the

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"service of this notice, we shall on Saturday, July 8, 1944 . . . .
"apply to His Majesty's justices of the peace . . . . to issue
"their warrant directing the constables . . . . to enter and
"take possession of the said tenement and to eject any person
"therefrom.

(Signed) S. A. Copp and Son."

Messrs. S. A. Copp & Son, who signed this notice, were not usually nor had they ever been employed by the landlord in letting Sunnyside, Kingscott, or in the collection of the rents thereof, and they had not been specially authorized to act in the matter by writing under the hand of the landlord.

The justices were of opinion that the notice was valid and that the provisions of the Small Tenements Recovery Act, 1838, had been sufficiently complied with in law. Accordingly, they issued their warrant. The question for the opinion of the court was whether they came to a correct determination in point of law.

Anningson for the tenant: Messrs. S. A. Copp & Son were solicitors for the landlord and they served this statutory notice, but, as found by the justices, they were not usually, nor had they ever been, employed by the landlord in letting these premises or in the collection of the rents thereof, and they had not been specially authorized to act in the matter by writing under the hand of the landlord. Accordingly, they did not come within the terms of s. 7 of the Small Tenements Recovery Act, 1838, as "agents" of the landlord to serve this notice. The words of s. 7 are:—"the word 'agent' shall "be taken to signify" the classes of persons there specified, and these words must mean those classes of persons and no one else. There is no precise authority on the point, but see *Reg.* v. *Hopkins* (1).

The landlord did not appear.

HUMPHREYS J.: Singleton J. will deliver his judgment first.

SINGLETON J: Mr. Anningson, for the tenant, has admitted that Messrs. S. A. Copp & Son, who served the statutory notice of the landlord's intention to apply to the justices for possession of the premises, were solicitors acting for the landlord and so in the ordinary sense of the word were his

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(1) (1900) 64 J. P. 454.

"agents," but he submitted that they were not "agents" within the meaning of ss. 1 and 7 of the Small Tenements Recovery Act, 1838, to serve this notice and that, therefore, the notice was invalid and the justices had not jurisdiction to issue their warrant. In *Reg.* v. *Hopkins* (1), Channell J. held that the question whether the person who served the statutory notice under s. 1 of the Act of 1838 was an "agent" was a question of fact; but that must mean whether he, in fact, was a person who came within the definition of "agent" in the Act. Section 7 contains the definition of "agent." The justices have found that Messrs. S. A. Copp & Co. were not any one of the persons specified in s. 7. They were not persons usually employed by the landlord in the letting of the premises or in the collection of the rents thereof, nor were they specially authorized to act in the particular matter by writing under the hand of the landlord. The section does not provide that the word "agent" shall "include" this or that class of persons: it provides that the word "agent" "shall "be taken to signify" certain classes of persons. Prima facie those words mean shall be taken to signify those classes of persons and no others. In my opinion, therefore, Messrs. S. A. Copp & Son were not "agents" within the meaning of ss. 1 and 7 of the Small Tenements Recovery Act, 1838, to give the statutory notice in compliance with the Act, and consequently the justices were not entitled to issue the warrant. The appeal must be allowed.

CROOM-JOHNSON J.: I agree. It is remarkable that since the passing of the Small Tenements Recovery Act, 1838, one hundred and six years ago, there has been no authority on the point here at issue, namely, whether s. 7 of the Act contains an exclusive definition of the word "agent" for the purposes of the Act. No doubt, the more self-evident is a proposition the less likely there is to be authority for it. I have looked at the text-books on Landlord and Tenant and they all assume, without giving any authority for the statement, that the definition of "agent" in s. 7 of the Act is an exclusive definition. See the works of Woodfall (24th ed.), at p. 1117; Redman (8th ed.), at pp. 813 and 816 and Foa (6th ed.), at p. 897. In *Reg.* v. *Hopkins* (1) the server of the statutory notice admitted in cross-examination that he had only collected the rent once, and the justices found that the agency was sufficiently

(1) 64 J. P. 454.

proved. Channell J. said on the point whether the server was the "agent" of the landlord that this had been found as a matter of fact by the justices. The question of fact seemed to be whether the server came within one of the classes specified in s. 7. If s. 7 is an exclusive section, that is, if it contains all the kinds of agent who are entitled to give the statutory notice, by the findings of the justices here these solicitors were not agents to serve the statutory notice. The Small Tenements Recovery Act, 1838, was a statute giving a summary remedy to landlords by which they could obtain possession of their premises. My recollection of the authorities is that it has been held that the statute confers jurisdiction on justices, not to make an order after the manner of a civil court, determining the rights of the parties, but to grant a specific remedy to a landlord, namely, a warrant for possession, where the conditions of the statute are fulfilled, at a saving of costs and expenses to both landlord and tenant. From an examination of the very detailed and specific provisions of s. 1 one sees that it was the intention of the legislature that this summary remedy should be hedged about with restrictions, considered necessary for the protection of the tenant, e.g. the statutory notice of the application for possession must be read over and explained to the person served or with whom it is left by the person who serves it. A good example of the strictness with which the courts require the provisions of the Act to be fulfilled, before granting this remedy to the landlord, will be found in *Delaney* v. *Fox* (1). Reading s. 7, in this view of the Act, I think that the expression "shall be "taken to signify" must mean that an "agent" must be one of the persons or classes of persons mentioned in that part of the section, and no one else. If that is so, the justices having found that Messrs. S. A. Copp & Son did not come within any one of these classes, there was no evidence entitling the justices to find that the provisions of the Small Tenements Act, 1838, had been sufficiently complied with, since their findings lead to the opposite conclusion.

HUMPHREYS J.: I regret that I find myself compelled to agree that Messrs. S. A. Copp & Son were not "agents" to serve the statutory notice within the meaning of s. 7 of the Small Tenements Recovery Act, 1838. I can only read s. 7 as defining the classes of person who are entitled to serve the statutory notice of the landlord's intention to apply to the

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(1) (1856) 1 C. B. (N. S.) 166.

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justices for possession of the premises as being one of the classes of persons specified in the section. We all take the view that if the words in s. 7 had been " the word ' agent ' shall include " the persons there specified the decision of the court might have been different. If a landlord is minded to take advantage of the exceptional remedy provided by this ancient Act of Parliament, he must bring himself within the terms of that Act, archaic though they may be. The appeal must be allowed.

Appeal allowed.

Solicitors for the appellant : *Gibson & Weldon, for T. Oerton, Bideford.*

C. G. M.

C. A.

1945

Jan. 19, 22, 23 ; Feb. 9.

Scott, du Parcq and Morton L.JJ.

SANDILANDS *v.* CARUS.

Husband and wife—Justices' order for wife's maintenance—Payments duly made under order—Wife's common law right to pledge husband's credit for necessaries—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), ss. 4, and 5 (a) and (c), as amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 1, sub-s. 1.

The order of a court of summary jurisdiction under s. 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, for the payment of a weekly sum by the husband to his wife for maintenance with which the husband has complied (the court having made no order of separation under s. 5 (*a*) of the Act) is no bar to the common law right of the wife to pledge her husband's credit for necessaries.

Willson v. *Smyth* (1831) 1 B. & Ad. 801, distinguished.

Appeal from Croom-Johnson J. at Lancaster Assizes.

The defendant, James Gerald Carus, married Josephine Genee Victoria Dampier-Cross on September 10, 1930, and lived with her at Carlton Farm, North Walsham, for about three years, when he deserted her, leaving her without means. On April 30, 1934, on the wife's application under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 (1) (as amended) before a court of summary jurisdiction, sitting at Cromer, the justices made an order under s. 5 (*c*) of that Act (1)

(1) Summary Jurisdiction (Married Women) Act, 1895, s. 4 (as amended by s. 1, sub-s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925) : " Any married woman . . . . " whose husband shall have been " guilty of . . . . wilful neglect to

that the defendant should pay to his wife 10*s.* a week, on the ground of his wilful neglect to provide reasonable maintenance for her. In December, 1934, Mrs. Carus, who was then in very poor health, went to live at Cheator Lodge, Windermere, the boarding-house of the plaintiff, Elizabeth Lucy Sandilands, situated within a mile of the house where the defendant was living with his mother. Mrs. Carus stated her position to the plaintiff, who took her in and nursed her, crediting the defendant with the expenditure of her board and lodging at 2*l.* 10*s.* 0*d.* a week, and with the cost of certain goods, such as shoes and underwear, and small loans. Against this expenditure Mrs. Carus made certain payments to the plaintiff from a small voluntary allowance which she received from her brother until he died in February, 1935, and the 10*s.* a week received by her from the defendant. Throughout the material time this amount was always punctually paid by the defendant. The plaintiff rendered accounts for the balance to the defendant at intervals of approximately two months, headed by the words: " Wife maintenance." The defendant did not pay the accounts, and on May 25, 1935, by a solicitor's letter, disclaimed all liability for them. Mrs. Carus continued to live with the plaintiff until 1943. On March 31, 1942, Mrs. Carus filed a petition for divorce on the ground of her husband's desertion. The proceedings were not defended and she obtained a decree nisi on January 11, 1943, which was made absolute on July 19, 1943.

On March 21, 1940, the plaintiff had issued her writ in this action for the cost of board and lodging and for goods, loans and out-of-pocket expenses and interest thereon supplied to the defendant's wife as necessaries against the credit of the

" provide reasonable maintenance " for her . . . . may apply to any " court of summary jurisdiction " acting within . . . . the petty " sessional or other division or " district . . . . in which the cause " of complaint shall have wholly " or partially arisen, for an order " or orders under this Act . . . ."

Section 5. " The court of " summary jurisdiction to which " any application under this Act " is made may make an order or " orders containing all or any of " the provisions following, viz. :— " (*a*) a provision that the applicant be no longer bound to " cohabit with her husband (which " provision while in force shall " have the effect in all respects of " a decree of judicial separation on " the ground of cruelty) : . . . . " (*c*) a provision that the husband " shall pay to the applicant " . . . . such weekly sum not " exceeding two pounds as the " court shall, having regard to " the means both of the husband " and wife, consider reasonable . . . ."

defendant from December 29, 1934, to February 24, 1940—651*l.* 1*s.* 0*d.*, including 81*l.* 2*s.* 0*d.* interest. At the trial of the action on June 1 and 2, 1944, no evidence was called for the defendant, who was then serving in the Forces. Croom-Johnson J. found that the amount claimed was not extravagant for the position in life which Mrs. Carus occupied before the desertion, but he held, on the authority of *Willson* v. *Smyth* (1), that the continued payment of 10*s.* a week made under the justices' order of April 30, 1934, was a bar to the action. He added that if he were wrong on the point of law, he would have had the greatest difficulty, owing to the lack of evidence, in coming to the conclusion, having regard to the position of the defendant and of Mrs. Carus at the material time, that the assessment of 10*s.* a week by the justices was not fair and reasonable. He gave judgment for the defendant. The plaintiff appealed.

Clothier K.C. and *S. R. Baker* for plaintiff. The decision in *Willson* v. *Smyth* (1), on which Croom-Johnson J. founded his judgment, is not binding on the Court of Appeal and in any event is distinguishable from the present case. In that case, in a suit by a wife against a husband in the Consistory Court, an order was made on the husband for alimony pendente lite. Such an order would be comparable to an order by justices in granting a separation order under s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895. By s. 194, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 5, sub-s. 1, of, and sch. 1 to, the Law Reform (Married Women and Tortfeasors) Act, 1935 :—" In " every case of judicial separation . . . . (*b*) if alimony has " been ordered to be paid and has not been duly paid by the " husband he shall be liable for necessaries supplied for the use " of the wife." He was not so liable where he had paid the alimony, and by s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895, the provision made by justices that a wife shall be no longer bound to cohabit with her husband while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty. But no such order was made against the husband in this case. The order of the justices was made for maintenance under s. 5 (*c*) of that Act, where there is no such provision. A wife's common law right to pledge her husband's credit for necessaries is dependent on her status as a wife and can only be taken away by the specific provision of an Act of Parliament. In the absence of such a provision there is nothing in the maintenance order which prevents a wife from pledging her husband's credit after the order has been made, within the proper limits of the husband's liability for necessaries. They also referred to *Birmingham Union* v. *Timmins* (1).

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(1) (1831) 1 B. & Ad. 801.

Blackledge for defendant. Croom-Johnson J. was right in following *Willson* v. *Smyth* (2). That case is an authority for the proposition that where there is an involuntary payment by a husband for maintenance, made under sanction by an order of the appropriate court, acting pursuant to a statute, that order precludes any inquiry into the question of the wife's right to pledge her husband's credit for necessaries; or at least precludes any consideration of the question whether she is entitled to a larger sum than that ordered by the court to be paid. If the contention for the plaintiff is right, the wife, after obtaining a maintenance order, is in a position immediately to pledge her husband's credit for necessaries. That cannot have been intended, since by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, she may apply at any time for an increase in the amount granted; provided that fresh evidence as to the husband's means is forthcoming. There is, moreover, by s. 11, a right of appeal from the court of summary jurisdiction to the Probate, Divorce and Admiralty Division.

[He referred to *Johnston* v. *Sumner* (3), *Eastland* v. *Burchell* (4), *Dewe* v. *Dewe* and *Snowdon* v. *Snowdon* (5), *Batty* v. *Lee* (6) and Lush on Husband and Wife (4th ed.) at pp. 334, 344, 349 and 350. DU PARCQ L.J. referred to Shelford on Marriage and Divorce (1841) at p. 599.]

Clothier K.C. in reply.

Cur. adv. vult.

Feb. 9. The judgment of the court was read by DU PARCQ L.J.: The main question for decision in this appeal is whether a claim against a husband for money due for necessaries supplied to a wife whom he has deserted is defeated by proof that at the material times the husband was paying weekly sums to his wife in pursuance of an order of a court of summary jurisdiction, made under ss. 4 and 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895. The common law doctrine was accurately stated by Lush J., in delivering the judgment of the Queen's Bench Division in *Eastland* v. *Burchell* (1). Dealing with the case of a husband who compels his wife to leave his home (which, of course, does not differ in any essential respect from that of a husband who deserts his wife and refuses to provide a home for her) that learned judge said: " He is bound to maintain her elsewhere, and if " he makes no adequate provision for this purpose, she becomes " an agent of necessity to supply her wants upon his credit. " In such a case, inasmuch as she is entitled to a provision " suitable to her husband's means and position, the sufficiency " of any allowance which he makes under these circumstances, " is necessarily a question for the jury. Where, however, the " parties separate by mutual consent, they may make their own " terms; and so long as they continue the separation, these " terms are binding on both."

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(1) [1918] 2 K. B. 189.
(2) 1 B. & Ad. 801.
(3) (1858) 3 H. & N. 261.
(4) (1878) 3 Q. B. D. 432.
(5) [1928] P. 113.
(6) [1938] 4 All. E. R. 207.

In the case before us there is no doubt that the defendant not only neglected to maintain his wife but deserted her, and the evidence satisfies us that, although he had complied with the justices' order, he had not made adequate provision for her maintenance. The wife never agreed to a separation, nor did she apply to the justices for what is commonly called a " separation order " under s. 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895. The order was made under s. 5 (*c*), on the ground that the husband had " been guilty " of wilful neglect to provide reasonable maintenance for her." The husband had regularly paid to her the 10*s*. 0*d*. a week which the justices had considered to be a " reasonable " payment " having regard to the means both of the husband " and wife." We quote the words of s. 5 (*c*), but admittedly this wife had no means of her own and was not in a position to earn her own living. There is no doubt that where justices grant a married woman a " separation order " under s. 5 (*a*) of the Act, and the payments ordered are duly made by the husband, she loses her right to pledge his credit. This is a statutory exception to the common law rule. Section 5 (*a*) of the Summary Jurisdiction (Married Women) Act, 1895, enacts that the provision " that the applicant be no longer " bound to cohabit with her husband " . . . . " while in " force shall have the effect in all respects of a decree of judicial

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(1) 3 Q. B. D. 435, 436.

"separation on the ground of cruelty." Section 194 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which corresponds to s. 26 of the Matrimonial Causes Act, 1857), must now be read as amended by s. 5, sub-s. 1, of, and the schedules to, the Law Reform (Married Women and Tortfeasors) Act, 1935. In its present form it provides that :—"In every case of judicial separation . . . . (*b*) if alimony "has been ordered to be paid and has not been duly paid by "the husband he shall be liable for necessaries supplied for "the use of the wife." (1). Having regard to the history of the relevant legislation and to s. 4, sub-s. 2 (*b*), (1.), of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is, we think, manifest that s. 194 of the Act of 1925, as it now stands, must be taken impliedly to exempt from his common law liability in respect of necessaries a husband who, after a judicial separation, has duly paid alimony which he has been ordered to pay. There is, however, no provision in the relevant statutes to the effect that a wife who has obtained an order for maintenance loses her right to pledge her husband's credit if he complies with the justices' order. The fact that provision is thus made in s. 5 (*a*) for the exclusion of that common law right in one event only is, we think, a strong indication that in other cases falling within the same section Parliament did not intend the common law right to be abrogated or diminished. On this ground alone we should be disposed to hold, on principle and apart from authority, that the order of the justices in this case cannot have the effect for which the defendant contends.

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(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 194 (1.) (now amended) :—"In "every case of judicial separation ". . . . (*b*) the wife shall, during the "separation be considered as a "feme sole for the purpose of "contract and wrongs and injuries, and of suing and being "sued, and the husband shall not "be liable in respect of her "contracts . . . . Provided that— "(i.) where on any judicial separation alimony has been ordered to "be paid and has not been duly "paid by the husband, he shall be "liable for necessaries supplied for "the use of the wife . . . ." By s. 5, sub-s. 1, and the first schedule of the Law Reform (Married Women and Tortfeasors) Act, 1935, the following sub-section shall be substituted for s. 194, sub-s. 1.

"(1.) In every case of judicial "separation— . . . . (*b*) if alimony "has been ordered to be paid and "has not been duly paid by the "husband, he shall be liable for "necessaries supplied for the use "of the wife."

Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4, sub-s. 2 :—"For the avoidance of "doubt it is hereby declared that "nothing in this Part of this "Act— . . . . (*b*) exempts the "husband of a married woman "from liability in respect of any "contract entered into or debt or "obligation (not being a debt or "obligation arising out of the "commission of a tort) incurred, by "her after the marriage in respect "of which he would have been "liable if this Act had not been "passed ; . . . ."

There are, in our judgment, other cogent reasons for rejecting the defendant's submissions. It cannot be suggested, of course, that the decision of the justices created an estoppel since the plaintiff was no party to the proceedings at petty sessions. Even if the justices had decided in terms that 10*s*. 0*d*. a week was (in the words of Lush J.) "a provision suitable to her "husband's means and position," it is difficult to see why a jury (or a judge performing the functions of a jury) should be precluded from re-considering that matter on all the available evidence, or why the justices' finding on this question of fact should bind another tribunal. But we are far from being satisfied that the justices were bound to decide, or did decide, that precise question. When a wife, applying for such an order as was here made, is bona fide willing, and indeed anxious, as this wife was, to resume cohabitation with her husband, the justices are making, and know that they are making, an order which is in its nature temporary. The husband may at any moment again assume all the obligations which are inseparable from the proper performance of his marital duties. In such circumstances, and having regard to their power to review the order on a subsequent application, the justices are very likely to order weekly payments which will no more than suffice to satisfy the wife's immediate and most pressing needs. The jury in a common law action is asked the question whether the goods or services obtained from the plaintiff were "necessaries," in the sense indicated by Lush J. in the passage which we have quoted. Though they may be satisfied that the husband's present means do not enable him to pay for those "necessaries" forthwith, they may still be fully justified in giving a verdict against him. A wife may be entitled, having regard to her husband's means and position, to pledge his credit (for example, to a draper for clothing or to a doctor for his fees) to an amount which could never be provided out of such temporary weekly payments. Indeed, it is not too much to say that in some circumstances a deserted wife may pledge her husband's credit (just as he might, if they were living together, pledge his own credit) to an amount which he can only pay if a reasonable time for payment is given to him. If it be granted that the goods or services are "necessaries," it is for the creditor to decide whether he is willing to give credit to the husband, and it is never an answer to a claim which is otherwise lawful, to say merely that the defendant has not the means to pay it. A husband with 500*l.* a year might well be held liable to a single creditor for necessaries valued at 25*l.* or even 50*l.*, but justices making an order for maintenance are not in a position to order him to pay week by week a sum which would enable the wife, perhaps in a sudden emergency, to find such an amount. Nor could a wife in whose favour such an order is made expect credit to be given to her personally. She would indeed be put into the position of a feme sole (which she is not) without enjoying any of the advantages which may sometimes be associated with that status. It is not a sufficient answer to say that the wife can always apply to have the weekly payments increased. On such an application the justices (unless they decline jurisdiction in favour of the High Court under s. 10 of the Act) can still only order small weekly payments, and the wife's needs may be such as to demand immediate satisfaction. Further, it is, we think, noteworthy that the consequences of non-compliance with a justices' order, which usually affects men with small, fluctuating and insecure weekly incomes and with little or no capital, are so grave that the petty sessional court is likely of set purpose to order a weekly payment small enough to be certainly within the husband's means in any given week. By s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, payment is to be enforced in the same manner as payment of money is enforced under an order of affiliation. The result of this provision is that on failure to make a weekly payment the husband may be imprisoned without any further evidence that he has the means to make the payment: see *Rex* v. *Richardson* (1). The power of making an order merely for maintenance is possessed only by courts of summary jurisdiction, and we think it reasonably plain that what Parliament intended was that the husband should be compellable, under pain of imprisonment, to pay so much at least as his wife's necessities required and his means would certainly permit. We see no sufficient ground for holding that a wife can only obtain such an order on the implied understanding that she thereby surrenders a common law right which has for centuries been an incident of the status of marriage.

(1) [1909] 2 K. B. 851.

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The learned judge considered himself bound to decide in favour of the defendant on the authority of *Willson* v. *Smyth* (1), which was a decision of the Court of King's Bench in the year 1831. In that case a husband was sued for necessaries supplied to his wife, who was living apart from him. His defence was that his wife had obtained a decree in an ecclesiastical court for alimony pendente lite, with which he had duly complied. Lord Tenterden C.J., who tried the action, in the words of the report, "thought that the decree for alimony, and "payment of the amount by the husband, discharged him "from further liability, and were an answer to the action." He therefore directed a non-suit. On motion for a new trial, it was contended on behalf of the plaintiff that the payments made by the husband were in fact to be regarded as a voluntary allowance, because the decree in compliance with which they were paid had become inoperative by the transfer of the cause in which it was made from the Consistory Court to the Court of Arches, and that the sufficiency of the allowance could, therefore, be questioned. This contention was rejected, and, on the footing that the payments were not voluntary, the court refused to grant a rule for a new trial. Of the four judges who heard the motion (Lord Tenderden C.J., Littledale, Taunton and Patteson JJ.), only the chief justice and Taunton J. gave reasons for their judgments, and it is perhaps of some importance that Taunton J. is reported as saying that "prima facie, the amount of alimony ordered is "evidence that that sum was sufficient." There can be no doubt that in most, if not in all, cases the alimony decreed pendente lite by an ecclesiastical court constituted a provision for the wife suitable to the husband's means and position. Relief was not often sought from the ecclesiastical courts by persons with very small incomes, except in cases where a suit was brought in forma pauperis, and then no order for alimony was made. When an order for alimony was made, it must almost always have been reasonable to presume its sufficiency for the purpose of the common law action. It is true, as the note in the report of *Willson* v. *Smyth* (2) points out, that it was the practice to make a much smaller allowance for alimony during suit than for permanent alimony, but that was mainly because the wife's position pendente lite was so delicate that she would naturally be expected to live in seclusion and so would want "a mere subsistence": see *Cooke* v. *Cooke* (3).

(1) 1 B. & Ad. 801.

(2) Ibid. 801, 804.

(3) (1812) 2 Phillim. 40, 44.

It may be open to doubt whether it was right in 1831, or would be right today, to lay down an absolute rule that a plaintiff in a common law action for the price of necessaries can never question the sufficiency of the amount payable under an order for alimony pendente lite. It is not, however, necessary for us, on this appeal, either to question or positively to affirm the decision in *Willson* v. *Smyth* (1), which is, in our view, distinguishable from the present case. When an order for alimony pendente lite was made in the ecclesiastical courts in favour of a petitioner, the wife's position was very different from that of a wife who is not asking for any relief except a reasonable sum for her maintenance. In *Willson* v. *Smyth* (1), the wife was praying for an order which would free her from any obligation to cohabit with her husband, and was asking the court, as an incident of the relief which she was seeking, to compel her husband to give her a sum which would keep her in a manner appropriate to her position. There is no true analogy between an order for alimony pendente lite and such an order as is here in question. For these reasons we are of opinion that *Willson* v. *Smyth* (1) has no application to this case and that the defendant's compliance with the justices' order does not of itself provide him with a defence. We wish to add, however, that it must not be supposed that, as a general rule, credit may safely be given to a wife in whose favour a similar order has been made. We think that it was manifestly the primary intention of Parliament that, by this new form of summary procedure, speedy relief should be made available to wronged wives whose husbands are persons of small means. The provision for the wife which, in the words of Lush J., is " suitable to her husband's means and position " will in such cases usually be but small and is, as a rule, likely to be fairly represented by the payments which the justices have ordered. The law is the same for all, but the decision must always turn on the facts of the particular case, and the facts of this case make it exceptional.

After a full consideration of the evidence, we are satisfied that the plaintiff's claim is amply justified. Early in his judgment Croom-Johnson J. said: " I see no reason to tax " down the amount of this claim, if the plaintiff satisfies me " that she is entitled to maintain the claim at all." By this, the learned judge seems to have meant no more than that the charges were reasonable, since later in the judgment he

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(1) B. & Ad. 801, 804.

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expressed the view that there was no evidence before him to show what were the husband's means at the material time. We respectfully dissent from this view. The wife's evidence showed that while she was living with her husband he allowed her 2*l*. a week for housekeeping alone, and that they kept a car, travelled in first-class carriages, stayed at good hotels, and generally lived like prosperous people. It is not to be presumed, without evidence, that his means had been reduced. Indeed, the presumption is that they had not, and, though such a presumption may easily be rebutted, no evidence was called to rebut it. Further, there was evidence that the husband, according to his own admission, had been left a substantial sum of money by his father's will. The judge attached importance to the fact that he had sold his farm, but, for all that was proved, the sale may have been advantageous to him. In the circumstances, the sums charged for board and lodging by the plaintiff, which in themselves are certainly reasonable, were, we think, no more than a husband in this defendant's position (judged, as it must be, from the evidence) should be called upon to pay on his wife's behalf, and we think that any jury, properly directed, would have been likely so to hold. The charges for interest must, however, be excluded from the amount claimed. Mr. Clothier, while admitting that these charges could not be supported, asked that interest at three per cent. might be allowed under s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, on the total amount of the claim from the date when the last account was presented, namely, February 24, 1940. This seems to us to be a reasonable request.

The appeal is allowed with costs. The judgment and order of the learned judge must be set aside, and in lieu thereof judgment will be entered, with costs, for the total amount of the plaintiff's claim, excluding all interest except that which in our discretion we have awarded under the statute.

Appeal allowed.

Solicitors for plaintiff: *Gibson & Weldon, for E. Geoffrey Wilson, Kendal.*

Solicitors for defendant: *Beachcroft & Co., for Ernest Temple, Kendal.*

C. G. M.

McVITTIE *v.* BOLTON CORPORATION.

C. A.

1945
Jan. 18, 19;
Feb. 9.

Scott,
du Parcq and
Morton, L.JJ.

Local government—Building or structure—Ruinous or dilapidated condition—Detrimental to amenities of neighbourhood—Order on owner to repair—Power of local authority in default to demolish building or structure—Removal of rubbish resulting from demolition—Removal of machinery—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 58.

A local authority obtained an order from a court of summary jurisdiction under s. 58, sub-s. 1, of the Public Health Act, 1936, calling upon the owner of certain premises to execute such works of repair or restoration or if he so elected to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as might be necessary for remedying the cause of complaint, which was that the building or structure by reason of its ruinous or dilapidated condition was seriously detrimental to the amenities of the neighbourhood. The owner failed to comply with the order within the time specified, and the local authority thereupon proceeded to demolish the building or structure and to remove the rubbish resulting from the demolition. In the course of carrying out such work the authority removed and stored certain articles of machinery which were on the site. In an action against the local authority for trespass :—

Held, by the Court of Appeal (du Parcq and Morton L.JJ., Scott L.J. dissenting), reversing Singleton J. on this point, that the articles of machinery were not "rubbish resulting from the "demolition" within the meaning of s. 58 of the Act and the local authority were liable in trespass to the plaintiff.

Per Morton L.J. The meaning of "rubbish" as used in the section is the meaning given in the Oxford English Dictionary, namely "waste or refuse material . . . . such as results from the decay or repair of buildings, debris, litter, refuse."

APPEAL from Singleton J.

The plaintiff was the owner of two adjoining plots of land in Bolton, Lancashire, a larger and smaller plot, which he acquired from the Bolton Corporation in 1913, a 999 years' lease of the plots, which had originally been granted to them, being assigned to him. The corporation had used the larger site as a tram shed. When the plaintiff acquired the plots he converted the tram shed into a cinema, and he used the smaller plot as a machine shop, certain machinery being on it. In 1930 the cinema was burnt down and became a very unsightly structure. In 1937 the corporation obtained an order from the justices under s. 58 of the Public Health Act, 1936 (1), calling on the plaintiff, as the owner of the structure, to execute such works of repair or restoration, or if he so elected to take such steps by demolishing the structure and removing any rubbish resulting from the demolition as might be necessary for remedying the cause of complaint within six months. That order only applied to the larger site. The ground of the application for the order was that the cinema was, by reason of its ruinous condition, seriously detrimental to the amenities of the neighbourhood. The plaintiff appealed unsuccessfully against the order (2). After waiting for six months from the decision in the final appeal the corporation cleared both sites, and removed all the machinery, including two heating boilers, a gas engine, a dynamo, a cooling tank and a stone crusher, which the plaintiff had left on the larger site, to a yard belonging to the corporation. The plaintiff brought an action against the corporation for trespass to the land and goods. It was admitted at the trial that the corporation was not entitled by the justices' order to go on to the smaller site and demolish the structure and remove any chattels that were thereon, and Singleton J. awarded the plaintiff 42*l*. as damage in respect of this trespass, but he decided in favour of the defendants in respect of the plaintiff's claim for damage for the alleged tortious act of the corporation with regard to the larger site and removal of any chattels thereon. If he was wrong he assessed the damages in respect of such trespass in the sum of *2l.* The plaintiff appealed on his claim respecting the larger site.

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(1) Public Health Act, 1936, s. 58, sub-s. 1: "If it appears to "a local authority that any building or structure, or part of a "building or structure . . . . (*b*) is "by reason of its ruinous or "dilapidated condition seriously "detrimental to the amenities of "the neighbourhood, the authority may apply to a court of "summary jurisdiction, and the "court may . . . . (ii.) in the "second mentioned case, make an "order requiring the owner of the "building or structure to execute "such works of repair or restoration or, if he so elects, to take "such steps by demolishing the "building or structure or any "part thereof and removing any "rubbish resulting from the demolition, as may be necessary for "remedying the cause of complaint."

Sub-section 2: "If the person "on whom an order is made under "sub-s. 1 of this section for the "execution of works, or the "demolition of a building or "structure or of any part of a "building or structure, and the "removal of any rubbish resulting "from the demolition, fails to "comply with the order within "the time therein specified, the "local authority may execute the "order in such manner as they "think fit and may recover the "expenses reasonably incurred by "them in so doing from the person in default, and without "prejudice to the right of the "authority to exercise those "powers, he shall be liable to a "fine not exceeding ten pounds."

(2) [1939] 4 All E. R. 236.

Hemmerde K.C. and *S. R. Baker* for plaintiff.
Gorman K.C. and *A. E. Jalland* for defendants.

Cur adv. vult.

Feb. 9. The following judgments were read :—

Scott L.J. The amount of money involved in this appeal is small ; but a question of general importance to the public is raised on the interpretation of s. 58 of the Public Health Act, 1936. That section extended the powers of a local authority in relation to dangerous buildings, by including a most valuable new provision, namely, to deal with " any building or structure " which is by reason of its ruinous or dilapidated condition " seriously detrimental to the amenities of the neighbourhood." English law had long recognized the duty of occupiers of land not to offend their neighbours' sense of smell or hearing, but had left them lamentably free to offend their neighbours' sense of sight. This section gives the local authority power, and inferentially imposes on them a duty, to consider the visual appearance of dilapidated buildings and structures and the injury it may do not only (as in the case of dangerous buildings) to persons on the premises or on adjoining premises, but to a whole neighbourhood. It is obviously a remedial measure in aid of town and country planning, and a valuable adjunct to that legislation, and one which may help materially in preventing ugliness and thus preserving and increasing the beauty of England and Wales.

The legal procedure of the section is similar for both types of social offence with which it deals, but the powers conferred on the local authority under the new jurisdiction are, naturally enough, in view of the expressed object of Parliament in conferring them, somewhat wider than in the old case of a building which causes a merely physical danger to persons on the premises or adjoining premises. By sub-s. 1 of s. 58, the local authority are in both cases given power to apply to a court of summary jurisdiction for an order on the owner requiring him

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to repair or, if he so elects, to demolish the offending building or structure, and, in that case, "to remove any rubbish "resulting from the demolition"; but, in the case of a building or structure "detrimental to amenities" the alternative duties imposed are "to execute such works of repair or restoration, "or . . . . to take such steps by demolishing it in whole or in "part as may be necessary for remedying the cause of com-"plaint," that is, for remedying the harm to "the amenities of "the neighbourhood." Sub-section 2 confers definite powers on the local authority in the event of the owner failing to comply with the order within the time given him by the justices; and these powers are both wide and discretionary, namely, to "execute the order in such manner as they think "fit"; and thereafter to recover from the owner in default "the expenses reasonably incurred by them." Two limitations are, no doubt, imposed on the exercise of the powers so given to the local authority, in the event of the owner failing effectually to achieve the object of the provision, namely, that of protecting "the amenities of the neighbourhood" from detriment. The first is that the local authority must not do more than is reasonably necessary to achieve that object; and the second (which is implied) is that in executing the order "in such manner as they think fit," they must act reasonably: but, in construing the statutory provision, it is material to bear in mind that the power conferred is a default power, that is, to act in the place of the owner and do what he, as a responsible person, could and should have done. The local authority stand in his shoes in order that they may act as the statutory owner pro hac vice, and they are free to do what he ought to have done, in such manner as they think fit, and are not called upon to consult his wishes.

[His Lordship stated the facts and continued:] In regard to the machine-shed site, their action was obviously a trespass; but the learned judge gave the plaintiff 42*l*. damages in respect of it; and I am satisfied that that figure is ample compensation for any loss caused by the trespass. There could be no claim in the circumstances except for the money loss suffered. It is not necessary to say anything further about that part of the case.

In regard to the main site, Mr. Hemmerde for the plaintiff, contended, first, that the defendants were not entitled under the section to dig below the ground level, but did so and extracted certain pieces of machinery, and thereby committed trespasses to the plaintiff's land. His second contention was that some of the things so taken away were not "rubbish" within the meaning of the section and that, therefore, the defendants had no power to take them off the site, even for safe storage, and, therefore, by taking them away, converted them. His third contention was that the section gave the defendants no power to take any chattels off the site. I do not accept any of these contentions. To the first, the answer is, in my opinion, that power to demolish a building necessarily extends to the whole of it, and, therefore, to its basement and cellars and foundations. To leave basements exposed below the level of the street, as has, in the necessities of war, been so often the case in London under emergency powers of demolition, is obviously to stop short of the total demolition of a house, and from the point of view of amenity causes a horrible eyesore in a well-ordered urban street. The contention that some of the ancient and rusted pieces of machinery were not "rubbish" is more arguable; but I take the view that all scrap is included in the term "rubbish," and these things were all mere scrap—valued at so much a ton. The word "rubbish" in the part of the section about amenities has, by reason of its context, a very wide meaning. "Dirt" is often defined as "matter out of place." I think anything left on the site of a building demolished under the default powers of the section, which in fact results from the demolition, is "rubbish." One test may be its function. All the machines, etc., about which the plaintiff complains, were there, not for their functional purposes, but merely as derelict appurtenances of the derelict building: and, indeed, were nearly as dilapidated as the building, though not quite. It may be they could have been sold not as mere scrap but for some trivial figure beyond scrap value. None the less the utter neglect of them by the plaintiff, I think, shows that he was treating them as mere scrap. In my view (and also in that of the learned judge below) they were all things within the meaning of the word "rubbish" in the section, but if any of them were not rubbish, the answer I think is that the defendants had implied authority under the section to do what the owner ought to have done, namely, to remove any such chattels to a safe place of storage; and that they did. If so, there was no conversion. To leave a quantity of such things on the site would have prevented its restoration to a condition consistent with "the amenities of the neighbourhood," which was the object it was their duty to achieve. I go further. I think that the defendants were under a duty to take care of such chattels belonging to the owner, by removing them, together with what was technically "rubbish," and holding them at the owner's disposal in a suitable place at his expense. This they did. Such authority was, I think, impliedly conferred on the defendants when acting in the place of the owner on the true interpretation of the section as a whole, under the discretion conferred by the words of sub-s. 2. As du Parcq L.J. suggested during the argument, they were agents of necessity to do this. It follows that there was no trespass to the chattels. They have all been properly cared for, and the plaintiff has been under a continuing request to remove them on payment of the expenses for storage.

There are no merits in this appeal. The plaintiff ignored his social duty from 1934 onwards and his legal duty from the moment when the justices' order under the Act of 1936 was served on him. It is obvious that he kept the land and his structure and machines on it, in the state he did, solely because he thought it helped him towards finding a purchaser of the land. I agree with the learned judge below that his utter want of care for the machines is conclusive that he attached no value to them as machines.

Since writing this judgment I have read the judgments of my brethren. I had, of course, realized that the word "rubbish," with the qualification "resulting from the "demolition," might be construed as limited to things like bricks, steel and other constructional materials, but I still think that the wider interpretation is the right one in the context of the section. If I am wrong Parliament might well be disposed to amend the section so as to prevent its object of preserving, restoring or improving amenities being defeated. I think the appeal should be dismissed with costs; but, as my brethren are not in complete agreement with me, I leave the order of the court to them.

du Parcq L.J.: I have had the privilege of considering in advance the judgment which has just been delivered by Scott L.J. and also the judgment which Morton L.J. is about to read. If the word "rubbish" in the section were not qualified by the words "resulting from the demolition" I should have agreed with Scott L.J. that the engine and boilers in question could, on the evidence, properly be regarded as "rubbish," having regard to the context in which the word appears. I am, however, impressed by the difficulty of saying that they are "rubbish resulting from the demolition," and I have come to the conclusion, not without some regret, that it is insuperable. If it had been impossible for the corporation to ascertain the plaintiff's wishes as to the disposal of the chattels, it may well be that they would have been entitled, as agents of necessity, to remove them to a place of safety, but they made no attempt to ascertain his wishes until the removal was complete, and there is no evidence that it was impossible to do so. In the circumstances, therefore, this plea will not avail them. I concur in the order which Morton L.J. is about to propose.

Morton L.J.: It was admitted during the trial before Singleton J. that there was trespass by the defendants on the smaller site, and trespass to certain goods which were on the smaller site. As to the larger site, it is not disputed that the defendants were entitled to enter it, to demolish a certain structure on it known as "Tonge Picturedrome," and to remove any rubbish resulting from the demolition. These acts they were entitled to do under s. 58 of the Public Health Act, 1936, and an order made thereunder. The plaintiff, however, claims that the defendants exceeded their powers in removing certain machinery belonging to him which was on the larger site. [His lordship then read s. 58, sub-ss. 1 and 2, of the Act of 1936, stated the facts, and continued :] I do not think that sub-s. 3 is material for the present purpose. The words "execute the order" in sub-s. 2 are to be noted. The words "in such manner as they think fit" do not confer any power on the local authority to travel outside the terms of the order. Nothing was done by the plaintiff to comply with the order of the justices, therefore the corporation thought it right to exercise their powers under s. 58 of the Public Health Act, 1936. Unfortunately, they exceeded their powers. Besides demolishing (as they were entitled to do) the unsightly remains of the Picturedrome they demolished a shed on the smaller site, and they removed some machinery from both sites to the corporation yard in Mare Street. The machinery on the smaller site consisted of a gas engine and a crude oil engine, which were inside the shed, and two cooling tanks and a concrete mixer, which were lying on the ground outside the shed. I can find no adequate reason why the defendants should have

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thought that the smaller site came within the order, or why they should have thought that the machinery on the smaller site was " rubbish resulting from the demolition." However, as I have already said, they admitted trespasses to land and goods in respect of the smaller site in the course of the trial before Singleton J. He awarded the plaintiff 42*l.* in respect of those acts, and I see no reason for differing from his judgment on this point.

I now turn to the larger site. It is not in dispute that there was certain machinery on the larger site, at the time of demolition, which was removed by the defendants to their yard. That machinery is very briefly described in the judgment of the learned judge, but it seems clear from the evidence, that it consisted of two heating boilers, a gas engine, a dynamo and cooling tank and a stone crusher. These machines were valued by the plaintiff's son at 125*l.*, but the learned judge obviously did not accept this evidence. He thought the machines were worth very little, and I see no reason for disagreeing with this view, but I think that, on any view of the evidence, the machines were there, and each of them was saleable in 1940 even if the purchaser would have dealt with them as scrap-iron. I regard the plaintiff's complaint under this head as very trivial, but it raises a question of some importance as to the construction of s. 58 of the Public Health Act, 1936.

That question is, do the words " rubbish resulting from the " demolition," on their true construction, include these machines ? It is to be noted that nothing can come within these words unless it is rubbish, and is rubbish which results from the demolition. The Oxford English Dictionary defines " rubbish " as " Waste or refuse material, in early " use especially such as results from the decay or repair of " buildings ; debris, litter, refuse." Other meanings are then added, but to my mind these are the meanings which the word covers in this section. I can see no reason for giving it a more extended meaning in the context in which it occurs,and I think the reason why the section makes no reference to the removal of anything other than rubbish is that it never occurred to the framers of the section that anyone would be so foolish, or so unreasonable, as to desire to leave articles of any value on the site, or to object to their removal. If this is the true construction of the section, I do not think that the machines in question were " rubbish." If, however, they can fairly be described as rubbish, I entirely fail to see how they can fairly be described as "rubbish resulting from the demolition."

After any demolition of a structure, it is inevitable that there will be certain things upon the site, for example, fragments of plaster or stucco, pieces of brick and other pieces of matter which were part of the structure when it was standing, and which became rubbish as a result of its demolition. Such things would clearly be "rubbish resulting from the demolition." On the other hand, a house already damaged by fire, or by enemy action, may have in it such articles as a safe or a mantelpiece, each of them complete in itself but built into the wall of the house. If the house is subsequently demolished under the section, and the demolition is carried out with due care, the safe and mantelpiece will still be in existence in their original condition, but each of them will be a wholly separate article instead of being part of a house. This is a result of the demolition, but can it be said that the safe or the mantelpiece is "rubbish resulting from the demolition" within the section? I cannot so construe the section. There may be border-line cases in which it is difficult to say whether the article in question is rubbish, and, if so, whether it results from the demolition. For instance, opinions might differ on the question whether such things as blocks of stone or undamaged bricks, which formed part of the structure demolished, and could be used in other building operations, were "rubbish" within the section, though it would seem clear that, if they are rubbish, they resulted from the demolition.

In the present case, while opinions may differ whether the machines in question are "rubbish," I cannot see in what sense they resulted from the demolition. The demolition had no effect whatever on these machines. Before the demolition they were two heating boilers, a gas engine, a dynamo and cooling tank and a stone crusher. They were lying on the ground, and at least one of the boilers, and probably both of them, lay in a cavity. They were old and of little value, and, according to the evidence of the witness Dodworth, covered with debris. After the demolition they were still the same machines, in exactly the same condition, except that the debris had been removed from them. For the purpose of removing them to the defendants' Mare Street depot the two boilers were "taken into their "sections" (as Mr. Dodworth put it) and the wheels were taken off the gas engine, but I do not think that that has any bearing on the question whether these machines were "rubbish "resulting from the demolition." Nor do I think it is material, for the decision of this question, to consider whether any one or more of these machines was or were beneath the surface of the site when the demolition took place. Wherever they were, it seems to me quite clear, on the evidence, that the demolition in no way altered the condition of any of them. The result is that, even if I were prepared to put so wide a meaning on the word "rubbish" as to include these machines, I should still feel quite unable to describe them as "rubbish "resulting from the demolition" of the structure in question.

I ought now to deal with certain matters which were discussed before us. In the first place, it was said, and said truly, that the object of the section was to improve amenities, and it was suggested that this object would be defeated if the justices had no power to order the removal of old machines, or safes, or mantelpieces from the site. I quite agree that an assortment of articles lying spread out on an open site may be a very ugly spectacle, and I think it might have been well if the section had given the justices power to make an order for their removal, with the result that the local authority could have removed such articles, if the owner failed to carry out the order. In my view, however, the section confers no power to order the removal of chattels, unless they come within the description of "rubbish resulting from the demolition," and I have already suggested a reason why it was not thought necessary to confer such a power. The result is that, if a man is so foolish, or so obstinate, as to insist on his machinery or mantelpieces being left on the site, he is entitled to do so, so far as regards this section of this Act.

Next it was said that the local authority must have an implied power to remove chattels from the site, so long as they act reasonably in so doing, and that the defendants have acted reasonably in this case. For my part, as the section gives an express power for the local authority to remove rubbish resulting from the demolition, on default being made by the owner, I see no reason for implying a power to remove things which are not rubbish and do not result from the demolition. Further, even if such a power can be implied, I do not think the defendants acted reasonably in removing these machines to their own premises without first asking the owner what were his wishes in regard to them. Again, it was suggested that, in removing these machines to their yard, the defendants acted as the plaintiff's " agents of necessity." I doubt if this defence is raised by the pleadings, but, assuming that it is sufficiently raised, on the facts of this case it is not established that any agency of necessity arose. No attempt was made to consult the plaintiff as to the disposal of these machines, and there is no evidence that it was impossible or even difficult to ascertain his wishes before removing the machines. The truth is, as the correspondence shows, that the defendants thought they had power to remove the machines on the larger site as rubbish, just as they thought (quite wrongly) that they had power to demolish the buildings on the smaller site and to remove machines therefrom. If they are wrong as to the machines on the larger site, I see no reason why they should not pay damages to the plaintiff in respect of this trespass to his goods.

Lastly, it was argued that the question whether these machines were " rubbish resulting from the demolition " was a question of fact, decided by the learned judge in favour of the defendants, and that his decision ought not to be disturbed. I do not agree that this was a question of fact. There was no real dispute as to what machines were on the land, though there was a marked difference of opinion as to their value. In these circumstances, the question which had to be decided was one of construction. Singleton J. thought that the machines were " rubbish resulting " from the demolition " within the meaning of the section, and I differ from him for the reasons which I have already expressed.

There being a trespass to goods in respect of the larger site, I have carefully considered what damage the plaintiff has suffered by reason of that trespass. In my judgment any damage which he may have suffered was negligible. If the machines had not been removed, they would have been lying in the open on the larger site. There is no evidence that the plaintiff could have used them, and, if he had wished to sell them, I see no reason why they were not just as easy to sell from the defendants' yard. Singleton J. expressed the view that, if he was wrong on the construction of the section, the plaintiff should only have 40*s*. damages, and I agree with this view. The result is that I would increase the damages awarded to the plaintiff from 42*l*. to 44*l*. I would leave undisturbed the order of Singleton J. as to the costs before him, and in all

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the circumstances of this case I would make no order as to the costs of this appeal.

Appeal allowed.

Solicitors for plaintiff: *Peacock & Goddard, for P. H. Barker & Co., Manchester.*

Solicitors for defendants: *Simmons & Simmons, for Philip S. Rennison, Town Clerk, Bolton.*

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MacKinnon and du Parcq L.JJ. and Uthwatt J.

BONHAM *v.* ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE COMPANY, LIMITED.

Insurance (motor car) — Policy — Third-party risks — Exceptions — Description of use—Proposal form—Whether passengers would be carried for hire or reward—Fatal accident to passenger—Practice of carrying some passengers in consideration of voluntary payments—No contract of hire—Expectation of reward.

The owner of a motor-car insured it against third-party risks by a policy which provided that the insurers should not be liable in respect of any accident or damage while the car was being used otherwise than in accordance with the "description of use" endorsed thereon, namely, "Use for social domestic and pleasure "purposes, and use by the insured in connexion with his business." In his answers to questions contained in a proposal form, the owner said that passengers would not be carried for "hire or "reward," nor would the car be let on hire. The owner, who used the car daily to travel to and from his place of work, habitually carried three passengers who worked at the same place, and accepted from two of them each day he carried them a sum equivalent to the return railway fare, but without any request for payment, or contract of hire. An accident occurred causing the death of one of the passengers, whose executor sued the owner for damages and recovered judgment. The owner claimed indemnity from the insurance company, and the claim was submitted to arbitration. The arbitrator held that the car was being used for hiring at the time of the accident, and that such use was contrary to the conditions of the policy, and that the owner was therefore not entitled to be indemnified. Atkinson J., on a special case stated, reversed the decision of the arbitrator. On appeal:—

Held, by du Parcq L.J. and Uthwatt J., MacKinnon L.J. dissenting, that although the car was not let on hire and passengers were not being carried for hire, yet passengers were being carried for reward on the day of the accident, and that this use of the car was contrary to the terms of the policy and therefore the owner was not entitled to be indemnified.

Per MacKinnon L.J. (dissenting). The carriage of passengers for hire or reward necessarily involved an antecedent contract between the owner and the passengers, legally enforceable, and the carriage of passengers in habitual expectation of a payment, voluntarily offered and accepted, was not outside the terms of the policy.

APPEAL from a decision of Atkinson J., on a special case stated by an arbitrator.

In April, 1939, the claimant, Bonham bought a Ford car on the hire-purchase system, and insured it with the respondents, the Zurich General Accident and Liability Insurance Co., Ld., against third party and other risks. The policy contained a clause entitled " general exceptions," and provided that the respondents should not be liable in respect of any accident, injury, damage, loss, or liability while any motor vehicle in respect of which the policy was issued was being used otherwise than in accordance with the " Description of use " endorsement thereon. The endorsement on this policy was—" use for social, domestic, and pleasure purposes and use by " the insured in connexion with his business or profession as " stated." Before the issue of the policy the claimant filled in the usual proposal form. In answer to the first question he stated that the car would be used solely for pleasure purposes, and to the question whether passengers would be carried for hire or reward, or whether the motor car would be let on hire, he replied " No." No. 7 of the general exceptions provided that the due observance of all the terms and conditions and the truth of the statements and answers in the proposal should be conditions precedent to any liability of the company to make any payment under the policy.

The claimant lived at Northampton and worked as an acetylene welder at Market Harborough. He drove to his work and back in the car every week-day, and for a long time he made a regular practice of taking with him, both ways, three passengers, named Cunningham, Drage and Clements, who were employed in the same works. No contract of carriage was ever entered into between the claimant and either of them, but Cunningham and Clements used regularly to pay to the claimant a small sum based on the cost of the return railway fare between the two towns. The money was voluntarily offered and accepted, but the claimant said he would have

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carried the passengers without any payment, if they had not offered to pay him. On January 28, 1941, the claimant was driving the car with the three passengers from Northampton to Market Harborough when an accident happened, as a result of which Cunningham was killed. Bonham was sued by Cunningham's executor, and judgment given against him for a considerable sum in damages. He claimed to be indemnified by the respondents under the policy. The respondents denied liability and the case was remitted to arbitration.

The arbitrator held, as a matter of law, that the car was being used otherwise than in accordance with the "description of "use" endorsed on the policy, namely, for hire or reward, and that the claimant was not entitled to be indemnified. On a special case stated for the opinion of the court, Atkinson J. gave judgment reversing this decision. The respondents appealed.

Serjeant Sullivan K.C. and *Armstrong Jones* for respondents. Atkinson J. treated this as a general insurance, subject to exceptions. In our submission it is a limited insurance, and even so subject to exceptions. The use to which the assured put this car was not the user contemplated by the policy, and the arbitrator came to a right conclusion.

They referred to *Passmore* v. *Vulcan Boiler and General Insurance Co., Ld.* (1); *Newell* v. *Cross and Plume* (2); *Wyatt* v. *Guildhall Insurance Co., Ld.* (3); *McCarthy* v. *British Oak Insurance Co., Ld.* (4); *East Midland Area Traffic Commissioners* v. *Tyler* (5).

It is not for the insurers to prove that this car was used for hiring: the claimant must prove that the user in fact fell within the description of user in the policy. Going to and from one's work is not "social, domestic, or pleasure purposes." It is business. If the car is being used by the assured not only in connexion with his business but also by three other persons in connexion with their businesses, that is outside the policy and in effect amounts to hiring.

Beney K.C. and *Gilbert Dare* for the claimant. The decision of Atkinson J. was right. Carriage for hire or reward necessarily involves an antecedent contract to carry for a certain sum.

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(1) (1936) 154 L. T. 258.
(2) [1936] 2 K. B. 632.
(3) [1937] 1 K. B. 653.
(4) (1938) 159 L. T. 215.
(5) (1938) 36 L. G. R. 530.

The arbitrator has not found that there was any contract between the claimant and any of his passengers. He carried them not in pursuance of a contract, but at the most, in expectation of a probable gratuity. See *McCarthy* v. *British Oak Insurance Co., Ld.* (1). On the facts the case comes within the terms of the policy, and the claimant is entitled to recover.

MACKINNON L.J., having stated the facts, continued:—Two defences to the claim were raised by the respondents—the insurance company. The first was that pursuant to the general exception, that the company shall not be liable in respect of any liability while the car is being used otherwise than in accordance with the " description of use " endorsement, it was not being used according to the endorsed description of use, " use for social, domestic and pleasure purposes and use by the " insured in person in connexion with his business or profession " as stated in the schedule "—that is of acetylene welder— " excluding use for hiring," and so on ; and it was said that on the facts found by the arbitrator he was not using it only for his own business, for going to his work, but was using it for hiring. It is sufficient to say that on those facts I am quite satisfied that the car was not upon this occasion being hired by him. I think we are all agreed on that and we did not ask Mr. Beney to deal with that point.

But there was a second and more formidable point raised by the respondent company, and in connexion with that they place reliance on No. 7 of the general exceptions, which says: " The due observance and fulfilment of the terms provisions " and conditions of this policy and of any endorsement hereon " in so far as they relate to anything to be done or complied " with by the insured and the truth of the statements and " answers in the said proposal shall be conditions precedent " to any liability of the company to make any payment under " this policy." In the proposal form, under No. 5, there are six questions asked and the sixth question is: " Will " passengers be carried for hire or reward, or will the motor " car be let on hire ? " To that the claimant answered " No." It is said that on the occasion of the accident and on a number of occasions before the day of this particular accident, the assured was carrying passengers for hire or reward, and, therefore, that his answer " No " to that inquiry whether it would be so used was untrue and that by reason of cl. 7 of the general

(1) (1938) 159 L. T. 215.

conditions there has been a breach of a condition precedent to the liability of the respondents.

The learned arbitrator, in his conclusion of law, says : " I am " of opinion that, upon these facts, Cunningham and Clements " were being regularly and habitually carried in considera" tion of separate payments made by them, that the pay" ments were made in consideration of the carriage of the " two men to and fro between their place of residence and " place of work ; that the claimant was regularly carrying " them for a ' quid pro quo ' (recognized as such by him and " them) ; and that he was carrying passengers for hire or reward " within the meaning of question 6 of the proposal form and " the answer thereto." Then he adds : " I am further of " opinion that ' use for hiring ' includes using the car ' for " ' the carrying of passengers for hire or reward ' and that the " claimant was using the car otherwise than in accordance with " the ' Description of Use ' endorsement on the policy, and that " he is not entitled to be indemnified by the respondents." Then he goes on to propound for the opinion of the court the question, which must be a question of law, " Am I correct "— that is, correct in law—" in holding on these facts that the " claimant was on January 28, 1941, using the car for hiring " and that such use was in violation of the terms and conditions " of the policy.". The learned arbitrator, therefore, on the facts as found, came to the conclusion in law that the car was being used otherwise than in accordance with the description of use on the back of the policy, in that it was being used for hiring and, secondly, that there was an untrue answer by the assured to the question in the proposal form " Will passengers be carried " for hire or reward or will the motor car be let on hire ? "

As I have already indicated I think it is clear that there was no breach of the stipulation in the endorsement " Description " of use." This car was not being used for hiring on this occasion. But the more difficult question remains, whether the answer " No " to the question in the proposal form " Will " passengers be carried for hire or reward ? " was untrue, and whether its untruth entitles the respondent insurance company to avoid any liability, pursuant to No. 7 of the general conditions. In my opinion Atkinson J. was right in concluding that the contention of the respondents was not correct. The question is " Will passengers be carried for hire or reward ? " and it goes on, as indicating a sort of thing which was in the minds of those who ask the question and to be considered by

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whoever has to answer it, "or will the motor car be let on "hire?" I think carriage for hire or reward imports carriage for some monetary or other remuneration pursuant to some form of contract by which the owner of the car would be entitled legally to claim the payment of that monetary reward from the passengers. On the facts as found in this case there was, in my view, no such legally enforceable contract. The arbitrator finds that the payments were on every occasion made voluntarily, although the assured accepted them, and further finds that if the passengers had not paid him anything the claimant would still have carried them. In my view the connotation of the whole sentence "Will passengers be carried for hire or "reward or will the motor car be let on hire?" imports a legal right of the assured, when he is carrying the passengers, to demand and exact from them that hire or reward. Of course, I do not overlook the fact that such a contract, resulting in a legal right of the owner to demand and if necessary recover legally a reward, might arise not only by express contract, but by a course of conduct. On the facts as found, however, I am satisfied that the arbitrator had not before him any evidence on which he could find that by any course of conduct a legally enforceable right to these payments by Cunningham and Clements had ever accrued to the assured. It remained, as is found, a purely voluntary payment and a payment which the assured could not demand or exact if it was not offered to him, as it had been for so many days.

That, in substance, is the ground on which Atkinson J. decided this case, by answering the question put by the arbitrator in this way: "You are not correct in holding that the "claimant was using the car for hire and, therefore, the "claimant is entitled to be indemnified, and your alternative "award in his favour for 2,015*l.* with costs, the amount for "which he had suffered judgment in the claim of Cunningham's "executor, must be allowed." The point is a difficult one, but I think the proper answer was given by the learned judge and that this appeal should be dismissed.

There are other considerations which arise in cases like this. There is the point that this is a defence raised by the respondents on the interpretation of certain words put forward by them in the proposal form, and if there is any ambiguity about the meaning of "hire or reward" I think those words are to be construed against the insurance company who so put them forward. In my view, the short answer to this case is that

" hire or reward " means a hire or reward in respect of which there is a legally enforceable claim. In this case the voluntary payment, however often made and however confidently expected by the owner of the car, did not amount to a claim for hire or reward within the meaning of the policy. I think that this appeal should be dismissed, but I gather that my brethren think otherwise.

DU PARCQ L.J. The facts in this case are very simple and it is difficult to say that it raises any question of law at all, apart from elementary law, other than a question of construction, which I agree with my Lord is not quite an easy one. A case of this kind, where the facts are simple and the law does not seem to be difficult, is one in which there is, unfortunately, apt to be a difference of judicial opinion, and I am sorry to think that this should be one of the cases in which there is a difference of opinion. I need hardly say that I am diffident about expressing a view which conflicts not only with that of my Lord, whose experience in these matters is great, but also with that of Atkinson J., but as I have formed a clear view I must, of course, express it.

I do not intend to refer, and I observe that my Lord has not referred, to authorities. I rather protest against the citation of a number of authorities on a matter of this kind. For myself, I do not think that any assistance is to be gained here by looking at cases dealing with sections of the Road Traffic Act or the law of contract; nor do I think that words in a policy must necessarily be construed as they would be in a pleading, as Mr. Dare seemed to suggest at one time. I propose to look at the words here as I think that the ordinary man, not being a lawyer, would look at them, and as I think Mr. Bonham must have understood them if he read them. The important words are those in the proposal form. Mr. Bonham was asked: " Will passengers be carried for hire or reward or " will the motor car be let on hire ? " A distinction is to be drawn between " hire " and " reward " : otherwise, the words " or reward " would not be necessary. So we have the question " Will passengers be carried for reward ? " The policy recites that the proposal form is to be the basis of the contract and is deemed to be incorporated therein ; and then at the end of it, in cl. 7 of the general conditions, comes the condition which has already been read by my Lord. I ask myself whether anybody, having answered that question and knowing that his promise has been incorporated as a term of the policy, could really say to himself: "Having said that I will not carry passengers for "reward, I am nevertheless at liberty to carry passengers "regularly every day, and to take from them each day, over a "considerable period, a sum equivalent to the cost to them of "travelling by the railway, and I shall still be fulfilling my "promise. I may carry passengers at 1*s*. 2*d*. a day, which they "never fail to pay and I always expect to receive, and, unless "they have agreed to pay so that I could sue them, it cannot "be said that I am carrying passengers for reward." I do not believe, if Mr. Bonham had thought about it (assuming Mr. Bonham to be typical of the ordinary reasonable man) that it would have ever entered his head to think that he could do anything of the kind.

The question and the only question in this case is whether the arbitrator was justified, on the facts as he found them, in holding that on the day when this accident happened the assured was carrying passengers for reward. I am satisfied on those facts that the assured was carrying two gentlemen as passengers, and that he intended to accept from them a payment which he expected to be tendered and which they intended to tender when he had given them their ride in his car. In those circumstances, I find it impossible to doubt that to the mind of the ordinary man—and I think in this the ordinary man would not be making an error as to the meaning of the English language—it would seem plain that the assured was carrying these passengers for reward on the day of the accident. It follows, on that view, that the claimant was not entitled to be indemnified.

Therefore, with great respect to Atkinson J., while fully realizing that he may be right and I may be wrong, but at the same time feeling in my own mind the conviction that I am right which forces me to differ from my Lord, I think that the learned judge below was wrong, and that he ought to have answered the question in para. 9 of the case in the affirmative with one modification. The question is not, I think, happily worded. It is "Am I correct in holding on these facts that the "claimant was on January 28, 1941, using the car for hiring "and that such use was in violation of the terms and conditions "of the policy?" The answer should have been that the arbitrator was right in holding on these facts that the use by the claimant of the car on January 28, 1941, was in violation of the terms and conditions of the policy. The answer to the

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question whether the claimant was entitled to be indemnified should have been that he was not. I think that the respondents ought to have had their costs before the learned judge, and that the proper order to be made in this court is that the appeal be allowed, that the judgment and order of Atkinson J. be set aside, and that there be substituted in lieu of it the order which I have suggested, and that the respondents, the insurance company, should have their costs of this appeal.

Uthwatt J. It is with some diffidence that I disagree with what has fallen from MacKinnon L.J. on a question which arises on the construction of a policy of insurance, a class of document with which I have no familiarity. The point on which I differ is indeed a very short one, and it is as to the proper construction of the question in the proposal form: "Will passengers be carried for hire or reward?" With everything else that fell from my Lord I agree. The point at issue is whether in that question there is imported the necessity that the reward should be payable under an agreement enforceable at law. My Lord is of the opinion that that is imported: du Parcq L.J. takes the contrary view and that contrary view, in the circumstances, I share. It appears to me that a distinction falls to be drawn between the word "hire" and the word "reward." The first word necessarily imports, I think, an obligation to pay. The inclusion of the second word is not, in my opinion, merely for the purpose of giving an alternative word to "hire" meaning the same thing, but for the purpose of bringing in a subject-matter which does not include hire and including (I do not say it is confined to that) cases where there is no obligation to pay. That, I think, is the only point on which there is a difference between my Lord, on the one hand, and, as I understand, du Parcq L.J. and myself on the other. If we are right in that view, that an obligation to pay is not necessarily inherent in "reward" as used in that clause, it is, I think, clear on the facts of this case that the claimant was carrying people for reward on the day in question. Whether he was carrying for reward in those circumstances is a question of fact determined by all the circumstances of the case, including the length of time over which this course of conduct (I do not call it "course of "business") has gone on; the nature of the payments made, namely, cash; the exact amount of the payment, 1*s.* 2*d.*, and its correspondence with the railway fare covered by the same journey. Taking all those facts together, it appears to me that in ordinary language (and I do not think my Lord would doubt this) if you leave out the question of contract, the man was carrying for reward.

In my view, therefore, the appeal should be allowed and the order should go in the form which du Parcq L.J. has indicated.

Appeal allowed :
Leave to appeal to House of Lords.

Solicitors for respondents : *A. E. Wyeth & Co., for Sharpe & Millichip, West Bromwich.*

Solicitors for claimant : *Gardiner & Co.*

H. L. L.

DOWD *v.* W. H. BOASE AND COMPANY, LIMITED.

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Scott, du Parcq and Morton L.JJ.

Master and servant—Transference of employment—Hiring of vehicle and driver—Negligence of driver—Injury thereby caused to third person—Liability of regular employer or of hirer—Respondeat superior—Dock regulation.

Where a vehicle, with the services of its driver, has been let out to a hirer by the regular employers of the driver, and an accident is caused through the negligence of the driver, if the regular employers wish to contend that they were not the driver's employers at the time when his negligence in performing his duties caused the accident the onus is on them to prove this. It is difficult for the regular employers to discharge this onus where the workman who caused the accident was driving a vehicle belonging to them, of which he was in sole charge, and which he alone was allowed to drive on the day of the accident. Prima facie the persons who have engaged a man to serve them, who pay his wages, and who have power to dismiss him if he misbehaves, are his employers during his hours of work for the purpose of the maxim " respondeat superior."

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DOWD *v.* W. H. BOASE AND COMPANY, LIMITED.

APPEAL from Stable J.

The following statement of facts is taken substantially from the judgment of Morton L.J.

Rea, Ld., had a contract to unload some frozen meat from a ship in the Gladstone Dock, Liverpool, and load it into vans. For the purpose of carrying out this work they required more bogies and drivers than they had available at the moment, and Boase & Co., Ld., a firm in the same line of business, arranged to supply to Rea, Ld., such bogies and drivers as they required. On July 20, 1943, one Davies, who had been for sixteen years in the regular employ of Boase & Co., Ld., as a bogie driver, was driving a bogie belonging to Boase, and was assisting Rea, Ld.'s, men in loading the meat into vans. The method of working was as follows. Rea, Ld., had fitted a platform or rig on the top of the bogie driven by Davies, in order to raise its height. The frozen meat carcases were swung from the ship on to the floor of the platform. The bogie was then driven to the van into which the carcases were being loaded. The bogie was backed up against the back of the van. The men who were shifting the carcases then moved van, the platform of the bogie being flush with the floor of the them from the bogie on to the van. While a bogie-load was in course of being loaded into the van, and the two men who were loading, one of whom was the plaintiff Dowd, were handling the last carcase, Davies started moving his bogie away from the van, in the mistaken belief that the loading had been completed, at a moment when Dowd was standing with one leg on the floor of the van and one leg on the platform of the bogie. The result was that Dowd fell to the ground and sustained injuries. Stable J. was satisfied that Dowd's injuries were due to the negligence of Davies, the driver of the bogie. Dowd brought an action to recover damages for his personal injuries against Boase & Co. and also against Rea, Ld. Stable J. held that Davies was at the time of the accident in the employment of Rea, Ld., and that therefore Boase & Co. were not liable. He also held that as the plaintiff was himself employed by Rea, Ld., he was in common employment with Davies, the negligent driver, and that therefore the plaintiff could not recover from Rea, Ld. The plaintiff appealed.

Hemmerde K.C. and *Rose Heilbron* for the plaintiff.

Laski K.C. and *Scholefield Allen* for W. H. Boase & Co., Ld.

Cur. adv. vult.

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LD.

APPEAL from Croom-Johnson J.

The following statement of facts is taken substantially from the judgment of Morton L.J.

The plaintiff McFarlane was a registered checker employed by a company called James Dowie & Co. and was engaged in checking goods at the North Sandon Dock, Liverpool, which were being loaded on a ship called the *Port Chalmers*. Whilst so engaged, McFarlane was run down, on August 22, 1943, by a mobile crane, driven by one Newall, and suffered injuries. It was not in dispute that Newall was negligent. The loading was being carried out by a firm of stevedores called Coggins & Griffiths (Liverpool), Ld., and Newall with the mobile crane was assisting in this work, but his regular employers were the Mersey Docks and Harbour Board, and the crane was the property of the board. The board have a large number of "mobile" cranes and they let them out on hire to persons loading or unloading vessels in their docks, on certain terms and conditions which were called "regulations." In this case the stevedores, Coggins and Griffiths, had applied in writing for the use of certain cranes, including this particular crane, for the loading of the *Port Chalmers* at the North Sandon Dock, prescribing the date and time when the cranes would be required. The application was dated August 4, and the mobile crane in question was still being used for this work on August 22.

McFarlane brought an action against Coggins & Griffiths (Liverpool), Ld., the hirers of the mobile crane and its driver, and also against the Mersey Docks and Harbour Board to recover damages for the personal injuries he had sustained. The Mersey Docks and Harbour Board relied as a defence on regulation 6 of their regulations, which provided "applicants "for the use of cranes must provide all necessary slings, "chains and labour for preparing the article to be lifted, and "for unshackling the same. They must also take all risks in "connexion with the matter. The Board do not provide "any labour in connexion with the cranes except the services "of the crane drivers for power cranes. The drivers so "provided shall be the servants of the applicants." The board also relied on the answer of the defendants Coggins & Griffiths (Liverpool), Ld. to interrogatories.

Croom-Johnson J. held that the Harbour Board, as the regular employers of Newall, were still his employers at the time of the accident and were therefore liable to the plaintiff in damages. The Mersey Docks and Harbour Board appealed.

Sellers K.C. and *Glynn Blackledge* for the Docks and Harbour Board.

Clothier K.C. and *Scholefield Allen* for Coggins & Griffiths (Liverpool), Ld.

Rose Heilbron held a watching brief on behalf of the plaintiff.

Cur. adv. vult.

Feb. 9. The judgment of the Court (Scott, du Parcq and Morton L.JJ.) was read by Morton L.J. These two cases were both decided at the Liverpool Summer Assizes in 1944. Stable J. gave judgment in *Dowd's* case on June 13 and Croom-Johnson J. (without having heard of the decision of Stable J.) gave judgment in *McFarlane's* case on June 29. In each case the question was whether the regular employers of a workman, or the persons who were temporarily making use of his services (hereinafter referred to as "the hirers") were liable for damage to the plaintiff resulting from the negligence of that workman. In each case it was manifest that the maxim "respondeat superior" applied, and that one of the two defendants was liable for the workman's tort. The facts in the two cases were not of course identical, but they were similar in some respects. In *Dowd's* case Stable J. held that the hirers were the employers of the negligent workman at the time of the accident. In *McFarlane's* case Croom-Johnson J. held that the regular employers of the negligent workman were still his employers at the time of the accident. The result of Stable J.'s decision was that the plaintiff Dowd failed in his action, as Dowd was himself employed by the hirers, Rea, Ld., and thus, being in "common employment" with the negligent workman, he could not recover damages against Rea, Ld. From that decision Dowd appeals and contends that the regular employers of the negligent workman, Boase & Co., Ld., were still the workman's employers at the time of the accident. In *McFarlane's* case no question of common employment arises, and the contest is between the regular employers of the negligent workman, the Mersey Docks and Harbour Board, as appellants, and the hirers, Coggins & Griffiths.

As the two cases raised substantially the same issues, and the decisions appeared to be in conflict, this court agreed to hear arguments in both cases before deciding either. The facts in each case are very fully and clearly stated in the judgment of the learned judge who tried it, and we shall only repeat those facts so far as is necessary in order to render this judgment intelligible.

[His Lordship, having stated the facts, continued :] There is no doubt that in each case the hirers, Rea, Ld., in the first case and Coggins & Griffiths in the second, had a considerable measure of control over the negligent workman. He was assisting in the work which they had contracted to do. They could tell him where to go, within the area in which the work was being carried out, what to transport on his bogie or crane, and where to deliver the goods which he was carrying. Moreover, in *McFarlane's* case there were certain provisions in the board's regulations, and certain answers to interrogatories, on which reliance was placed ; we shall return to these matters later. On the other hand, in each case it is clear that the workman, so far as the actual driving of the vehicle was concerned, had the entire control of it. He was the only man who had any right to drive it and, as Stable J. put it, " the " control of the vehicle, in the sense of the manipulation of the " controls, is a matter which must be left to the driver. It " is quite impossible for the principal to direct to what extent " the brake is to be applied and how far the steering gear and " so on and so forth is to be operated. The manipulation of " the controls is a matter for the driver himself."

It is clearly established that if the regular employers of a workman wish to contend that they were not his " employers " at the time when his negligence in performing his duties caused an accident, the burden is on them to prove this. Prima facie, the persons who have engaged a man to serve them, who pay his wages and who have power to dismiss him if he misbehaves, are his employers during his hours of work, and it is by no means easy for them to prove that at the relevant time some other person had such complete control over the workman as to become his " superior " for the purposes of the maxim " respondeat superior." This is illustrated by a long line of cases cited to us, of which the earliest was *Quarman* v. *Burnett* (1) (the well-known case in which two ladies hired a pair of horses and a man to drive a carriage) and

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(1) (1840) 6 M. & W. 499.

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the latest was a very recent decision of this court, *Nicholas* v. *F. J. Sparkes & Son* (1) decided on December 3, 1943. Included in this line of cases are two decisions of the House of Lords, *M'Cartan* v. *Belfast Harbour Commissioners* (2) and *Century Insurance Company Limited* v. *Northern Ireland Road Transport Board* (3). There are, however, certain reported cases in which the regular employers were held to have discharged that burden of proof. See *Rourke* v. *White Moss Colliery Company* (4) and *Donovan* v. *Laing, Wharton and Down Construction Syndicate Limited* (5), where the Court of Appeal followed the decision in *Rourke's* case (4). Lord Sterndale said in *Poulson* v. *John Jarvis & Co., Ld.* (6), referring to *M'Cartan's* case (2) and *Donovan's* case (5), "It "is very difficult to reconcile these cases," and we share his difficulty, but *Donovan's* case (5) was referred to with approval in the *Century Insurance* case (3) and it must be accepted that, on the special facts of *Donovan's* case (5), the decision was correct. We think the basis of the decision is to be found in the words of Lord Esher M.R. when he said (7): "The "man was bound to work the crane according to the orders "and under the entire and absolute control of Jones & "Company" (the hirers).

We do not intend to review the cases in detail, or to restate the principles applicable. This task has recently been performed by this court in *Nicholas* v. *F. J. Sparkes & Son* (1). We would only observe that the burden of proof lying on the regular employers is particularly difficult to discharge in cases where the workman who caused the accident was driving a vehicle belonging to them, of which he was in sole charge, and which he alone was allowed to drive on the day of the accident. In such a case the vehicle has been placed under the control of the driver by his regular employers, who rely on him to use his own skill and exercise his own discretion in driving it. This being so, if he causes an accident by negligent driving, it is not easy to establish that someone else was his "superior" at the time of the accident. *Nicholas'* case (1) and the two cases now before us all fall within this category. The answer to the question "Who was the superior at the "time of the accident" must depend in each case on the facts of that case, and no case can be said to govern another unless the facts are similar in all respects. We shall not embark on an exhaustive examination of the facts in these three cases. This has been done very skilfully by the counsel appearing before us, and various facts have been relied on as distinguishing *Dowd's* case and *McFarlane's* case respectively from *Nicholas'* case (1). In our view, however, in each of the cases before us the regular employers have failed to establish that the hirers had such control of the acts of the workman, at the time of the accident, as to become liable as employers for his negligence. In *Nicholas'* case (1), Scott L.J. delivered the judgment of the court (Scott, Luxmoore and Goddard L.JJ.) and said (1): "One test in cases of a vehicle lent with its "service to a hirer, is this question, 'In the doing of the "'negligent act was the workman exercising the discretion "'given him by his general employer, or was he obeying or "'discharging a specific order of the party for whom, upon "'his employer's direction, he was using the vehicle or other "'instrument?'." We are content to apply this test, so recently laid down in this court, and applying it we feel no doubt that in each of the cases before us the driver, in the doing of the negligent act, was exercising his own discretion as driver —a discretion which had been vested in him by his regular employers when he was sent out with the vehicle—and he made a mistake with which the hirers had nothing to do. The result is that the appeal in *Dowd's* case must be allowed. We doubt if Stable J. would have decided as he did if he had had before him reports of *M'Cartan* v. *Belfast Harbour Commissioners* (2) and *Nicholas* v. *F. J. Sparkes & Son* (1).

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(1) (1943) See note post p. 309.

(2) [1911] 2 I. R. 143.

(3) [1942] A. C. 509.

(4) (1879) 2. C. P. D. 205.

(5) [1893] 1 Q. B. 629.

(6) (1920) 122 L. T. 471, 474.

(7) [1893] 1 Q. B. 632.

It follows from what we have said that the appeal in *McFarlane's* case will be dismissed, but before we part from that case we ought to say a few words about the Mersey Docks and Harbour Board's regulations, and the answers of the defendants to interrogatories. Regulation 6, which was much relied upon before us, is as follows: "Applicants for the use "of cranes must provide all necessary slings, chains, and "labour for preparing the article to be lifted, and for unshackling the same. They must also take all risks in connexion "with the matter. The Board do not provide any labour in "connexion with the cranes except the services of the crane "drivers for power cranes. The drivers so provided shall be "the servants of the applicants." It is plain that reg. 6

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(1) (1943) See note post p. 309. (2) (1911) 2 I. R. 143.

cannot have the effect of transferring the crane driver from the service of the board to the service of the applicant. It could not be done without the consent of the crane driver. This being so, the last sentence of reg. 6 could amount to no more than an agreement between the board and the applicant that the crane driver shall be regarded, as between these parties, as the servant of the applicant for certain purposes. It is not necessary to decide what these purposes are. The regulation may be intended to place the liability for any tort of the crane driver, as between these parties, on the applicant, but however this may be, no such bargain can affect the right of the plaintiff to sue the party who was in fact the employer of the crane driver at the relevant time. Turning to the answers to interrogatories, No. 3, delivered on behalf of the plaintiff, was as follows: "Under whose immediate directions "was the driver of the crane working at the time of the "accident on August 22, 1943." To that the defendants Coggins & Griffiths answered: "the driver of the said crane "was working under the immediate directions of these "defendants' servants at the time of the alleged accident," while the defendant dock board answered: "the defendants "Coggins & Griffiths (Liverpool), Limited." It was argued that the answer of the hirers to this interrogatory concluded the matter against them, but Croom-Johnson J. did not take this view, nor do we. It is true that the crane driver was acting under the immediate directions of the hirers in the sense that they could tell him where to go and what to carry on his crane, but, as has already been pointed out, he was not under their directions in regard to the manner in which he should drive the crane, and it was the manner in which he drove the crane which caused the accident to the plaintiff. As a representative of the hirers said in his evidence: "We naturally "hang the slings on and sling the stuff, but of course we "leave it to the crane driver to take it in his way. We do "not interfere with the driver of the crane."

Appeal in Dowd's case allowed.
Appeal in McFarlane's case dismissed.

DOWD'S CASE.

Solicitors for plaintiff: *Sidney Pearlman, for Silverman & Livermore, Liverpool.*

Solicitors for defendants, W. H. Boase & Co., Ld.: *Barlow, Lyde & Gilbert, for A. W. Mawer & Co., Liverpool.*

MCFARLANE'S CASE.

Solicitors for plaintiff: *Silverman & Livermore, Liverpool.*

Solicitors for defendants, Coggins & Griffiths (Liverpool), Ld.: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

Solicitors for defendants, the Mersey Docks and Harbour Board: *Gregory, Rowcliffe & Co., for R. H. Bransbury, Liverpool.*

R. F. S.

NOTE.

NICHOLAS *v.* F. J. SPARKES & SON.

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1943
Nov. 5;
Dec. 3.

Master and servant—Transference of employment—Hiring of lorry and driver—Negligence of driver—Injury thereby caused to servant of hirer—Liability of regular employer or hirer—Respondeat superior.

Where a vehicle is let out on hire with the service of its driver, and an accident occurs through the negligent act of the driver causing personal injuries to a third person, one test in considering who is the superior of the negligent workman for the purpose of the maxim "respondeat superior," is the answer to the question whether the workman in the doing of the negligent act was exercising the discretion given to him by his regular employer, or whether he was obeying a specific order of the hirer for whom, on his employers' direction, he was using the vehicle.

APPEAL from Cardiff County Court.

The plaintiff Nicholas, a workman in the employ of Curran Industries, Ld., of Cardiff, when walking along a private roadway on their premises, was injured by the negligent driving of a lorry belonging to the defendants, F. J. Sparkes & Son, and driven by a driver called Morse employed by them. The lorry had been hired out by the defendants to Curran Industries, Ld., on the terms of a course of business between the two companies, under which the defendants hired out their lorries for periods of time. A sample order was as follows: "Please supply "1 lorry Sunday 11/4/43; 1 lorry for the rest of the week. Unless "otherwise instructed 3*l*. 3*s*. 0*d*. per day." The plaintiff brought an action against F. J. Sparkes & Son to recover damages for his personal injuries. The defendants alleged that at the time of the negligent act Morse was the servant of Curran Industries, Ld., and they (the defendants) were not liable. The County Court Judge held for the defendants and the plaintiff appealed.

Roskin for the plaintiff.
Humfrey Edmunds for the defendants.

Cur. adv. vult.

Dec. 3, 1943. The judgment of the court (Scott, Luxmoore and Goddard L.JJ.) was delivered by SCOTT L.J. It was contended by the defendants, and the learned county court judge held, that the driver was at the time of the negligent act, the servant of Curran Industries, Ld., because they were entitled to give him orders in such a way as to bring him within the principle of *Donovan* v. *Laing* (1). Currans were not called on to give evidence, but the defendants' manager was called and we have the county court judge's note of his evidence. On it he held that " while the lorry driver remained the servant of Sparkes " & Son they had parted with the power of control in respect of the " matter in which he was engaged, and therefore were not liable." In our opinion that is an incomplete and not wholly correct statement of the law, but even if it were both complete and correct, we should hold that there was no evidence to support it. The judge's note of the evidence of the defendants' manager is as follows : " Series of contracts " with Currans 2–9 [lorries] per week. Ring up and say how many " lorries they require per week. We don't know where they send them " or what they have to do. No control at all. Tell drivers to work " for week at Currans. Currans pay three guineas per day. Sample " orders for 1943 produced. A. J. H. Morse was driver but now in Air " Force. January/February, 1942, I sent Morse to Currans. Told " him to work there and accept orders, as other lorry drivers. There " for six months. Only working for Currans. Same lorry. I didn't " know nature of work No control over performance of work He " was a good driver. Horn was in working order that day. Morse's " statement, May 19, 1942, put in. *Cross-examined.* They could " only direct him where to drive to. We could take him away or give " him a holiday." It is unnecessary to refer to Morse's statement in detail, but it is plain from it that at the time of the accident Morse was under no present control by Currans He was driving from one point to another in Curran's yard—no doubt pursuant to some direction by Currans as to where he was to go He adds : " I have been employed " by Messrs. Sparkes & Son for two years and have been working in " Curran's yard for the past three months." In our opinion there was no evidence there to support the county court judge's finding that the defendants " had parted with the power of control in respect of the " matter in which Morse was engaged," and that that was enough. We do not think either that his very wide sentence about control is anything like a full or sufficient statement of the legal principle to be applied, or that the evidence of the defendants' general manager contains any evidence of such a transfer of the defendants' servant to Currans as would impose a responsibility on Currans, still less such as would relieve the defendants of their responsibility.

Before citing the decisions of this court and the House of Lords—all binding on us—in which the legal principle has been enunciated, one or two observations are desirable on the basis of that principle. It is part of the general law of tort, particularly applicable in regard to negligence. The relevant maxim of " respondeat superior " may well, historically, have arisen out of the frequently recurring financial impossibility of getting money satisfaction in damages out of the individual person who committed the wrongful act. Where he was the general servant of an employer who could pay, and especially when the employer was getting profit or other advantage through his servant and through the operation in the doing of which his servant did the wrongful act, " respondeat superior " was a maxim of natural justice. But where his servant was put by him in the position of being under a duty to him to obey the particular commands of a third person, and the command of that person was the direct cause of the wrongful act, then obviously, justice would require that the injured third person should be able to treat the person giving the dangerous command as the workman's " superior." This analysis of what may be the historical and certainly seems to be the logical genesis of the doctrine applied in the *Donovan* v. *Laing* (1) type of case, helps, as a pointer, to one limitation which affects the application of the principle. The power of control of the new " superior " must be present in connexion with the doing of the particular act which proves to be tortious and so gives the injured party a right of action. No other control is relevant. That is the ratio decidendi of the carriage cases, which held that the hirer, though having absolute power to direct the time and place of the drive he wants to take, has no control over the exercise by the driver of his act of driving. If he drives negligently and injures someone, it is his regular employer who is responsible and not the hirer of the carriage; because the hirer has no right, as a term of his contract of hire, to interfere with the driver in the exercise of his art. On the other hand, if the nature of the work, for which A. lends the use of his vehicle, or ship, or movable cranes to B., necessitates the exercise of detailed control by B. over the manner in which A.'s servant will have to do the work which A. has contracted with B. that A.'s servant shall do for B., so that it becomes the servant's duty (*a*) to comply with B.'s orders or (*b*) not to act except on B.'s orders, then pro hac vice, for the purpose of responsibility in tort, B. becomes the master of A.'s servant in the doing of that work. This was the basis of the decision in *Donovan* v. *Laing* (1) and in *Bain* v. *Central Vermont Railway Co.* (2). In the former, Bowen L.J. said (3) two things: (1.) The employer (for the purpose of the rule " respondeat superior ") is " the person who has " a right at the moment to control the doing of the act " (i.e. the act which causes the damage) and (2.) the hirer of a carriage with driver is not liable unless he " actively interferes with the driving "—i.e. in the exercise by the driver of his art. In *Bain's* case (2) the cause of the accident was the disregard by the servant of A. in driving A.'s train over B.'s railway, of the signals on B.'s railway, obedience to which by A.'s servant was implied by a vital term of the running power contract between A. and B. As the Privy Council said (4) " These " signals were the mechanical expression of the orders of the Grand " Trunk, orders which Frost " (the servant of the Central Vermont Ry. Co.) " at that moment was bound to obey " and the Board quoted the above sentence from Bowen L.J.'s judgment in *Donovan* v. *Laing Syndicate* (5) with approval. One test in cases of a vehicle, or other instrument, lent with its service to a hirer, is this question : " In "the doing of the negligent act was the workman exercising the "discretion given him by the general employer or was he obeying "(or discharging) a specific order of the party for whom upon his "employer's direction he was using the vehicle or other instrument ? " If that question be the right test the answer in the present appeal is obvious—Morse was exercising his own discretion as driver, and made a mistake with which Curran Industries, Ld., had nothing to do.

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(1) [1893] 1 Q. B. 629.

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(1) [1893] 1 Q. B. 629.
(2) [1921] 2 A. C. 412.
(3) [1893] 1 Q. B. 634.
(4) [1921] 2 A. C. 416.
(5) [1893] 1 Q. B. 629, 633, 634.

It is important to remember that the burden of proof rests on the general employer to show affirmatively that his negligent servant was not acting within the limits of a proper discretion as such servant, but that in pursuance of the arrangement (whether amounting to a term of a contract or not) between his general employer and the other party, the servant was governing or was bound to govern his conduct by following the guidance of the other party. The employer cannot escape liability on a negative, he must give positive proof of the assumption of such responsibility by the other party. In *Bull* v. *West African, etc., Co.* (1) the two native boys were, under the contract with the shipowner, clearly put under a duty to the shipowner to stay on board the lighter and be ready at all times to take a rope from the ship. It was the disobedience of that duty owed to the shipowner by contract with their general employer, which caused the loss.

In our humble opinion the opinions of Viscount Simon L.C. and Lord Wright in *Century Insurance Co.* v. *Northern Ireland Road Transport Board* (2) cover the present case. The former quoted and relied on (3) Lord Bowen's sentence in *Donovan's* case (4) already cited ; and the latter reviewed the authorities. He said this (5) : " Most cases "can be explained on the basis of there being an understanding that "the man is to obey the directions of the person which whom the "employer has a contract, so far as is necessary or convenient for the "purpose of carrying out the contract. Where that is the position, "the man who receives directions from the other person does not receive "them as a servant of that person, but receives them as servant of his "employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and "the times at which, the services are to be performed, being left to the "discretion (subject to any contractual limitations) of the other "contracting party, there must be someone who is to receive the "directions as to performance from the other party and they are given "to the employer, whether he receives them personally or by a clerk "or by the servant who is actually sent to do the work. That I think "is the position here. The contract is of a character very common "between the owner of lorries or other vehicles and one who wants to "hire them for the conveyance of his goods. In principle the facts "here are indistinguishable from those in *Quarman* v. *Burnett* (6)." We think the hiring of the lorry in the present case was exactly comparable. The learned judge fixed the damages at 100*l.* in case his judgment was reversed. The appeal must be allowed and judgment entered for 100*l.* damages, with costs here and below on scale C.

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(1) [1927] A. C. 686.
(2) [1942] A. C. 509.
(3) Ibid. 513.
(4) [1893] Q. B. 634.
(5) [1942] A. C. 517, 518.
(6) (1840) 6 M. & W. 499.

Appeal allowed.

Solicitors for plaintiff: *Gibson & Weldon, for Northcott Howell & Co., Cardiff.*

Solicitors for defendants, F. J. Sparkes & Son: *L. Bingham & Co., for James Chapman & Co., Manchester.*

R. F. S.

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Feb. 28;
Mar. 1, 12.
Lord Goddard,
du Parcq L.J.
and
Uthwatt J.

Defamation—Slander—Reference given by plaintiff, a solicitor, to prospective tenant of defendant—Words spoken by defendant in regard to reference and in regard to solicitor—Whether words spoken in way of plaintiff's profession and in relation to his conduct therein, and therefore actionable per se.

F., a prospective tenant of a house belonging to the defendant, was requested to provide references, and obtained one from the plaintiff, a solicitor and friend, who had acted professionally for him on other occasions, but was not so acting in the matter of the tenancy. The reference was signed "C. R. Hopwood, Solicitor." The reference was duly presented and subsequently, in a conversation between F. and the defendant, the latter was alleged to have said: "You have got one" [a reference] "from that pimp "Hopwood. It is quite worthless. His very calling as a solicitor "makes him write whatever suits his client best. Damn it, he would "sue his grandmother for 7*s.* 6*d.*" The plaintiff alleged that the words were defamatory and had been spoken of him in the way of his profession as a solicitor and in relation to his conduct therein:—

Held, that the words were defamatory, but in the circumstances could only be regarded as a slander on the man, his professional training as a solicitor being merely given as a reason for his actions. Accordingly the words complained of were not actionable per se.

Decision of Hallett J. affirmed.

APPEAL from Hallett J.

Lieutenant Finlay, an officer of the Fleet Air Arm, wished to become tenant of a house at Alresford belonging to the defendant Muirson and was requested to provide the usual references as to character and suitability. He obtained a reference from the plaintiff Hopwood, who was a solicitor and a close friend. Hopwood had acted professionally for Lieutenant Finlay on other occasions, but he was not so acting in the matter of the tenancy. The reference given by the plaintiff was signed with his signature, with the addition of the description "Solicitor." When the reference was given to him the defendant, it was alleged, uttered the following words in the presence of Lieutenant Finlay: "You have got one "[a reference] from that pimp Hopwood. It is quite worthless. "His very calling as a solicitor makes him write whatever "suits his client best. Damn it, he would sue his grandmother for *7s. 6d.*"

The plaintiff alleged that the words had been spoken of him in the way of his profession and in relation to his conduct therein, and were therefore actionable per se. Special damage was not pleaded.

Hallett J. held that the words did not reasonably convey any imputation of impropriety or misconduct on the part of the plaintiff in the way of his profession or of unfitness to carry on his profession in a proper and satisfactory manner, and therefore he dismissed the action. The plaintiff appealed.

Serjeant Sullivan K.C. and *Valentine Holmes* for the plaintiff. The principle laid down in regard to members of the medical profession in *Allinson* v. *General Council of Medical Education and Registration* (1) was in *In re a Solicitor* (2) extended to solicitors. [They referred also to *Dauncey* v. *Holloway* (3), *Jones* v. *Jones* (4) and *De Stempel* v. *Dunkels* (5).]

The fair interpretation of the words complained of is that the plaintiff is the sort of solicitor who would give false references to his clients. That view is confirmed by the vulgar abuse that follows, though it may be negligible in itself.

J. W. Morris K.C. and *Holroyd Pearce* for the defendant. The method of approach made by Hallett J. to the questions involved was fair and accurate. The view that he took was based on the evidence before him. The real question was this: "Was it reasonable or unreasonable to consider these words "an attack on the plaintiff as a solicitor?" The words are not defamatory. They really amount to this: "What I want "is not a reference given by a person as a matter of business, "but one given by a person who gives it as a matter of social "obligation." [They referred to *Sim* v. *Stretch* (6).] Even if the words are defamatory, they are not actionable without proof of special damage, as they were not spoken of the

(1) [1894] 1 Q. B. 750.
(2) [1912] 1 K. B. 302, 311.
(3) [1901] 2 K. B. 441.
(4) [1916] 2 A. C. 481.
(5) (1937) 158 L. T. 85.
(6) (1936) 52 T. L. R. 669.

plaintiff in the way of his calling, and do not impute unfitness for his profession or misconduct therein. *Doyley* v. *Roberts* (1), *Jones* v. *Jones* (2), *Dauncey* v. *Holloway* (3). The court should be slow to differ from the trial judge, who actually saw the parties and heard the evidence.

Serjeant Sullivan K.C. in reply. If it is alleged that a man, in the way of his calling, does something which in fact is not within the scope of his calling, it may nevertheless be defamation in the way of his calling and actionable per se. It is not necessary for incompetence to be imputed.

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Mar. 12. LORD GODDARD. This is an appeal from Hallett J., who dismissed the action brought by the plaintiff for slander alleging that the words complained of were spoken of him in the way of his profession as a solicitor and in relation to his conduct therein. As I understand the judge's reasons, what he has found is that on a fair and reasonable interpretation the words were not defamatory of the plaintiff and did no more than express, in a boorish and ill-mannered way, as everyone would agree, the objection of the defendant to a reference given by any solicitor. It is necessary, therefore, to examine the facts.

[His Lordship stated the facts and continued :] Hallett J. in his judgment said : " The question is, does that " [the words complained of] " reasonably convey any imputation of impro-" priety or misconduct in relation to or in connexion with the " plaintiff's profession as a solicitor or unfitness to carry on his " profession in a proper and satisfactory manner ? " I agree that that is the question in the case. At the close of the hearing, when there was a discussion as to costs, the learned judge referred to the action as one which failed for lack of proof of special damage. But the judge does not appear to have decided the case on that ground, for he went on to say that he regarded the words as meaning no more than that the defendant did not care for references given by solicitors ; that he did not want one given as a matter of business but as a social obligation. " To my mind," he says, " the words were an " objection to a solicitor's reference." Were that the case, the words were not only not defamatory of the plaintiff but were incapable of being defamatory of him. If defamatory at all, they would only be so of solicitors as a class, for which no individual solicitor could sue. On this matter I cannot agree with the learned judge. The opening words and the concluding words were aimed at the plaintiff, and he was mentioned by name. I agree it would be possible in temperate language to express an objection to a reference given by a solicitor without defaming solicitors as a whole or any particular named solicitor, but obviously the defendant intended to defame the plaintiff and, in my opinion, amply succeeded. He must have been very much surprised when told that he had failed. The only meaning I can attribute to the words is that the plaintiff is a man who will say anything by way of reference that he thinks will suit clients, without regard to whether what he writes is true or not. Whether or not words are capable of bearing a defamatory meaning is always for the court and is therefore to be regarded as a question of law. A Court of Appeal not infrequently differs from the trial judge on such a question. Whether they are in fact defamatory is a question for the jury, or for the judge at the trial, if he is sitting alone. But if he takes the view that the words are incapable of a defamatory meaning, so far as the plaintiff is concerned, and this court takes a different view, this court can also say whether they are in fact defamatory of him, though had the trial been with a jury it would be a matter for a new trial.

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(1) (1837) 3 Bing. (N. C.) 835.

(2) [1916] 2 A. C. 481.

(3) [1901] 2 K. B. 441.

Now comes the very much more difficult question whether the words are actionable per se. The cases in which the law will infer damage in actions of slander are clear enough; with regard to three of them, imputation of crime punishable by imprisonment, of unchastity in a woman since the Slander of Women Act, 1891, and imputation of certain diseases, at the present day hardly heard of as a ground of action, there is seldom any difficulty. It is when we come to the fourth class, words spoken of a person following a calling *and* spoken of him in that calling, which impute to him unfitness for, or misconduct in, that calling, that one is faced with a number of authorities not always easily reconcilable and depending often on very fine distinctions, and from which it is hard indeed to extract any principle. I do not propose to repeat what has often been said before as to the artificiality of the law relating to oral defamation. To look for a principle in the law of slander, said Lord Wrenbury in *Jones* v. *Jones* (1), is an idle

(1) [1916] 2 A. C. 814.

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quest. The language I have used in describing the fourth class of words that are actionable per se is, of course, that of Lord Sumner in *Jones* v. *Jones* (1). It is not enough that the words are spoken of a plaintiff in his calling; they must also impute to him unfitness for, or misconduct in, that calling. Serjeant Sullivan in a lucid and attractive argument submitted that oral defamation is actionable if it is defamation touching the profession. But that leaves the question, what is meant by touching the profession? He put it thus: if it is alleged that in the way of his calling he does an act which in truth is not an act of his calling, it is defamation in the way of his calling. With all respect, I do not find this satisfactory. If the act criticized is not an act of his calling, the criticism of it is not criticism in the way of his calling. To impute generally dishonest or dishonourable conduct to a professional man is certainly not enough. The only case which could ever have supported so wide a proposition is *Lumby* v. *Allday* (2), and the statement to that effect was criticized by Lord Haldane in *Jones* v. *Jones* (1). If the passage to which I have referred is to be supported at all, it can only be where the words are spoken of a trader and are such as would naturally reflect on his credit. Nor is it enough that the plaintiff's profession or calling should be referred to in the defamatory statement. In *Dauncey* v. *Holloway* (3), the defendant spoke of the plaintiff as " the lawyer in Orchard Street," but that did not make the words actionable. If two persons are discussing the action of a third in relation to his private affairs and it were said: " Well, " what could be expected, the man is a lawyer, it is the result " of the narrow legal mind," or " The man is a soldier with " a rigid military mind," this would have nothing to do with his fitness or conduct as a lawyer or a soldier.

Here we are considering a case where a solicitor has given a reference to a friend. In so doing he was not acting in a professional but in a private capacity. It is said that the reference to clients makes all the difference. In this respect one may say that clients are to a solicitor what customers are to a tradesman, and if it were said of a reference given by a grocer to his customer: " Oh, well, that is worthless, that " grocer will always say what he thinks will please a customer," that is no reflection on the goods he sells or his fitness to conduct a grocery business. It reflects on his personal honesty, but not on his conduct or capacity as a grocer. The present case seems to me exactly parallel. If the plaintiff had been acting professionally for Lieutenant Finlay, and in the course of his professional duty had made a statement with regard to the character or ability of his client, a suggestion that it was given recklessly or dishonestly would, I think, have been actionable per se. It would have been a reflection on the plaintiff's professional honour in the conduct of professional business. In the present circumstances I can only regard it as a slander on him as a man, his professional training being given as a reason for his having acted as he did.

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(1) [1916] 2 A. C. 481.

(2) (1831) 1 Cr. and J. 301.

(3) [1901] 2 K. B. 441.

I will add a few words with regard to *De Stempel* v. *Dunkels* (1), as that was a case on which Serjeant Sullivan relied. The actual decision in that case, in my opinion, was that if one speaks words to a man's employer attributing something to him which would indicate to the employer, who knows all the circumstances, that the employee is unfit for his occupation, those words are actionable per se, though they might not have been had they been addressed to others who had not the same knowledge. This is no more than was laid down in *Capital and Counties Bank* v. *Henty* (2). The words in that case were published only to persons to whom facts were known which would not have been known to the general public and were therefore held incapable of a defamatory meaning, though it was expressly said that it would have been different had they been published broadcast over Chichester.

For the reasons which I have endeavoured to express, I have come to the conclusion that these words are not actionable per se, and, accordingly, that the appeal fails and must be dismissed with costs.

DU PARCQ L.J.: In this case the plaintiff failed in his action for slander because Hallett J. held that the words spoken of him by the defendant were not actionable without proof of special damage, and no special damage was proved or alleged. The plaintiff is a solicitor, and the only question in the case is whether the judge was justified in holding that the words which were proved to have been spoken were not defamatory of him in the way of his profession. The learned judge put to himself the question, founded on the judgment of A. L. Smith M.R. in *Dauncey* v. *Holloway* (3): "Do the words reasonably convey

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(1) 158 L. T. 85.

(2) (1882) 7 A. C. 741.

(3) [1901] 2 K. B. 441, 446, 447.

" any imputation of impropriety or misconduct on the part " of the plaintiff in relation to or in connexion with his " profession or business, or of unfitness to carry on his profession " or business in a proper and satisfactory manner ? " He answered that question in the negative. " I think," said the judge, " that the reasonable meaning of this outburst was : " ' I do not regard a solicitor's reference as a satisfactory reference " ' at all. What I want is a reference from somebody who " ' does not give the reference as a matter of business, but " ' someone who gives it as a social obligation.' To my mind " the words were an objection to a solicitor's reference for this " purpose." Rightly, as I think, the learned judge refused to put on the words of the foolish insult which rounded off the slander the meaning ascribed to them by an ingeniously framed but unconvincing innuendo. The learned judge's paraphrase of the defendant's language is perhaps open to the criticism that it furnishes but a pale reflection of the matter, as well as the form, of the defendant's utterance. The calm and almost judicial appraisement of the value of a solicitor's reference into which the defendant's abuse is translated could hardly be said to be defamatory of the plaintiff, either in the way of his profession or at all, but I cannot doubt that the words in fact spoken were spoken of the plaintiff and were at least capable of a defamatory meaning. The words of stupid and vulgar abuse which introduced and concluded the substance of the slander indicated that the attack was aimed at the plaintiff as an individual. It was his reference which the defendant was rejecting as worthless, on the ground that in the circumstances it was likely to be unreliable. Whether the words were not only capable of a defamatory meaning, but were in fact defamatory of the plaintiff, is a question which I do not find it necessary to answer. I think that a jury might have said either " Yes " or " No " to it without incurring the rebuke that their verdict was one which twelve reasonable men could not have given.

But even if the words were defamatory of the plaintiff it does not follow that they are actionable without proof of special damage. As to this the judge applied the right test. The words which he took from the judgment of the Master of the Rolls in *Dauncey* v. *Holloway* (1) were in substance repeated by Lord Wrenbury, with special reference to solicitors, in *Jones* v. *Jones* (2), and in the latter case Lord Sumner, when he

(1) [1901] 2 K. B. 441.

(2) [1916] 2 A. C. 481, 507.

concisely classified words actionable per se, stated the same test in his definition of the fourth class (1): "When words are "spoken of a person following a calling, and spoken of him "in that calling, which impute to him unfitness for or mis- "conduct in that calling." The plaintiff follows the calling of a solicitor. Were the defamatory words spoken of him in that calling? Did they impute to him unfitness for or misconduct in that calling?

I have no doubt at all that if a jury, properly directed, had returned a verdict for the defendant, stating that in their view the slander did not touch the plaintiff in his calling, this court could not have set it aside. A judge, however, is not the constitutional tribunal for the decision of such a question in the sense in which a jury may be so described. His decision is open to review in this court, although I think that, if the slander is reasonably capable of more meanings than one, we ought to be slow to adopt a meaning which the judge has rejected after seeing and hearing the parties and their witnesses. It is at least as desirable in the case of actions for slander as in other branches of the law, that there should be an end of litigation, and if in such an action the judge is compelled by circumstances to do the work of a jury, I think that an appellate court ought not to be too ready, in the capacity, as it were, of a second jury, to say that he was wrong. In the end the question is not one on which a lawyer is better qualified to pronounce a view than a jury would be, and, if this court differs from the judge, it is not correcting any error of law. Judges are fitted to decide such questions, not by their knowledge of the law, but by their knowledge of the world, and they will be the first to admit that canons of construction which are properly applicable to contracts and statutes are a very unreliable guide to the reasonable interpretation of angry and ill-chosen words.

I have ventured to make these observations for two reasons: first, in order to justify my opinion that the question for us is not whether it would be possible to put on the words now under discussion a meaning which would involve an imputation on the plaintiff in, and touching, his calling, but whether the judge's conclusion that such was not their natural meaning is shown to be wrong; secondly, because I am of opinion that great weight ought to be given in this court to the judge's view, provided always that he did not wrongly apply the law

(1) [1916] 2 A. C. 500.

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or, in the customary phrase, "misdirect himself." I have already said that, in my opinion, Hallett J. applied the right rule, and, far from being satisfied that his conclusion was wrong, I am of opinion that in substance it was right.

I do not propose to speculate as to the divers meanings which this or that juryman might have put on this slander within the limits of reason. In my judgment the sting of the words lay in the suggestion that the plaintiff, rather than risk offending those who were, or were likely to become, his clients, would give them better references than the facts, as he knew them, fairly justified. It is no doubt the duty of everyone who gives a reference to state no more than he knows or believes and, so far as his knowledge is relevant, all that he knows, and to express no opinion which has not a solid foundation of fact. This is a moral and a social duty which is owed by all, and in so far as it is a legal duty it is binding on all. To say of a solicitor that a reference from him is worthless, and that his very training makes him, in common with all other solicitors, likely to fail in this general duty, is to charge him with misconduct, not as a solicitor, but as a citizen and a man. A man who is persuaded through moral weakness or a desire for profit to rate too highly the financial standing and general reputation of a client or customer is not thereby guilty of misconduct in his calling, in the sense in which that phrase is rightly to be understood. It is true that right minded persons will not think well of a man who gives misleading references, and that their disapproval of him is likely to affect him adversely in his calling, but this consideration does not entitle us to regard words spoken of a solicitor in relation to conduct outside his profession as "spoken of him in his calling." It is not enough that the words have a tendency to injure him professionally. (*Doyley* v. *Roberts* (1).) It is unnecessary to deal at length with this aspect of the case since it was the subject of a full exposition in *Jones* v. *Jones* (2). (See especially per Lord Haldane (3); per Lord Sumner (4), and per Lord Wrenbury (5). The fact that the defendant when uttering the slander referred to the plaintiff as a solicitor, in my opinion has no importance when it is seen that the misconduct alleged was not anything done in the way of his profession.

During the argument reference was made to the decision of this court in *De Stempel* v. *Dunkels* (1). In my opinion the decision in that case throws no light on the present problem. Serjeant Sullivan drew our attention to the passage in the judgment of Greer L.J., in which the opinion is expressed that *Jones* v. *Jones* (2) would have been differently decided if the defendant had gone to the plaintiff's employers and said to them : " Mr. Jones is an unfit person to be a teacher because " he has committed adultery with the wife of the caretaker." I am very ready to assume the accuracy of any opinion which was expressed by Greer L.J., and I will assume this dictum to be accurate, though without finally committing myself to acceptance of it. But I would observe that, however much importance is to be attached to the fact that Lieutenant Finlay had been, and intended again to become, a client of the plaintiff, nothing was said by the defendant which is in any way analogous to the words " Mr. Jones is an " unfit person to be a teacher." Whatever may be thought of the defendant's language, it is surely impossible to interpret it as meaning that, in his view at any rate, the plaintiff was unfit to be a solicitor. So far as the issue of slander was concerned, *De Stempel* v. *Dunkels* (1) did not, I think, lay down any new principle of law. All that was decided on the special facts of that case was that to allege of a diamond broker that he was a Jew hater was not merely to attribute to him an evil and uncharitable disposition but (what was more to the immediate purpose) to impute to him an antipathy which, besides being discreditable, rendered him unfit " to carry on " his business in a proper and satisfactory manner."

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(1) 3 Bing. (N. C.) 835, 840.
(2) [1916] 2 A. C. 481.
(3) Ibid. 491, 492.
(4) Ibid. 498, 499.
(5) Ibid. 507, 508.

For the reasons I have given, I am of opinion that the decision of Hallett J. was fully justified, and that the appeal should be dismissed.

Uthwatt J. : I agree. I do not think that the peccant phrase—finding its place between two distinctly personal references to the plaintiff—can be properly regarded merely as a generalization relating to the worthlessness of references given by solicitors. Its point lay in its application to the plaintiff. I disagree, therefore, with the meaning attributed to it by the judge. The slander as a whole is contemptuous of the plaintiff, and his profession is referred to as the reason for his liability to deviate from the truth. I read the phrase as meaning : " The plaintiff, because he is a solicitor,

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(1) 158 L. T. 85, 88.

(2) [1916] 2 A. C. 481.

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"will give any reference that suits the interests of a client, be "it true or false." The question is whether these words, rationally understood, convey an imputation on the plaintiff in his profession as a solicitor. In my opinion they do not. The giving of references for prospective tenants is no part of the avocation of a solicitor, though, through the standing of the profession, solicitors are often asked to supply references. In giving references the solicitor is not acting as a solicitor and that is none the less so where the person, in respect of whom the reference is given, habitually employs him as solicitor. That person would indeed say that the giver of the reference was his solicitor, and that he was the solicitor's client. But the habitual employment of a particular solicitor by an individual does not result in the creation of a status of "solicitor and client," with the result that any acts done by the solicitor for the individual are acts done by him in the course of his profession. The subject-matter dealt with on any particular occasion and the relation between the parties on that occasion have to be considered. Bearing these general considerations in mind, I fail to see that the words used convey an imputation on the plaintiff in his profession as a solicitor. The slander was on the solicitor as a man: not on the man as a solicitor.

Appeal dismissed.

Solicitors for the plaintiff: *Shirley Woolmer & Co.*
Solicitors for defendant: *Beachcroft & Co.*

[Reported by F. R. R. Burford, Esq., Barrister-at-Law.]

OUARDI KAVALA, LIMITED AND ANOTHER v. GRIGG AND OTHERS.

C. A.
1945
Mar. 6.
Lord Goddard, du Parcq and Lawrence L.JJ.

Emergency legislation—Requisition—Land—Power of competent authority to take possession—Willingness of owner to give possession by agreement—Whether power of competent authority restricted by provisions of Defence Act, 1842 (5 & 6 *Vict., c.* 94), *s.* 19—*Emergency Powers (Defence) Act*, 1939 (2 & 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-ss.* 1, 2 (*b*) (*i*), 4—*Defence (General) Regulations*, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 51 (*as amended*).

The Secretary of State for War, as the competent authority under reg. 51 of the Defence (General) Regulations, 1939 (as

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amended), is empowered by that regulation to take possession of any land and is under no obligation to treat or make an agreement with the owner thereof.

APPEAL from Atkinson J. (ante p. 157).

The facts and contentions of the parties are sufficiently set out in the report of the case in the court below, and for the purposes of this appeal it suffices to say that the plaintiffs contended that the power of the Secretary of State for War to take possession of land under reg. 51 of the Defence (General) Regulations, 1939, as amended, was subject to and governed by the provisions of the Defence Acts, 1842 to 1873; that, therefore, before taking possession under reg. 51 he should have taken steps to treat and agree with plaintiffs (who had always been willing to give possession by agreement) with reference to the acquisition of the land; and that as he had failed to take such steps his taking possession of the land was illegal.

Atkinson J. held that the Secretary of State for War, as the competent authority under reg. 51, had the power to take possession of land, and that that power was not in any way restricted or governed by anything which appeared in the Act of 1842. He therefore gave judgment for the defendants. The plaintiffs appealed.

Lyttleton Howes for the plaintiffs.

Colin Pearson for the defendants was not called upon.

LORD GODDARD: This appeal obviously fails. It turns on the true construction of reg. 51 of the Defence (General) Regulations, 1939, which are made under the provisions of the Emergency Powers (Defence) Act, 1939. His Majesty, in due course, by an Order in Council, issued what is now reg. 51 of the Defence Regulations, which, by para. (1,) provides: "A competent authority, if it appears to that "authority to be necessary or expedient so to do in the interests "of public safety, the defence of the realm, or the efficient "prosecution of the war, or for maintaining supplies or services "essential to the life of the community, may take possession "of any land, and may give such directions as appear to the "competent authority to be necessary or expedient in "connexion with the taking possession of the land. (1A.) Any "constable may take such steps and use such force as appears "to him to be reasonably necessary for securing compliance "with directions given to any person under the last foregoing "paragraph requiring him to give up possession of the "land . . . ." If that meant that the competent authority were obliged to make an agreement with the owner of the land as to giving possession, and could not take possession, if they did not agree without going through some step, there would not have been much point in para. 1A of reg. 51, because, obviously what can be done is that the authority can say that they are taking possession, that they can give the necessary direction to go out, and that if the person does not go out, they can call a constable, and the constable can put him out. The only thing with which we are concerned is the meaning of the words "take possession." I think that those words mean what they say, and that they give the authority the right to take possession, which is exactly what they did in this case. Therefore, the judgment below cannot be disturbed, and the appeal must be dismissed with costs.

du Parcq L.J. I agree.

Lawrence L.J. I agree.

Appeal dismissed.

Solicitors for the plaintiffs: *Roche, Son & Neale.*
Solicitor for the defendants: *The Treasury Solicitor.*

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

CLEGHORN *v.* SADLER.

1945
Mar. 6.
Croom-Johnson J.

Defamation—Slander—Office of honour or credit—Occupation of fire-watcher—A duty and not an office.

Practice—Slander—Words not actionable without proof of special damage—Submission at close of plaintiff's case—Ruling postponed—Evidence called for defendant.

In an action for slander, it was alleged that the defamatory words were spoken of the plaintiff in respect of her "office" of firewatching and touching her in that "office." Special damage was neither pleaded nor proved and counsel for the defendant, at the close of the plaintiff's case, submitted that there was no case for him to answer, and that he was entitled to a ruling on his submission at that stage:—

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Held, (1.) that the court could postpone its ruling, until the evidence for the defence had been concluded, and (2.) that firewatching was not an office of honour or credit, but a duty compulsorily imposed on citizens, so that defamatory words spoken of the plaintiff in respect of that occupation were not actionable without proof of special damage.

Observations of Goddard L.J., in *Parry* v. *Aluminium Corporation, Ld.* (1940) 162 L. T. 236, considered.

ACTION for slander, tried by Croom-Johnson J.

The plaintiff and defendant, married women, lived in separate maisonettes contained in the same building. The plaintiff, before the passing of the Fire Guard (Local Authority Services) Order, 1943, had been a voluntary authorized and, since that date, a compulsory, firewatcher. The plaintiff pleaded that on April 9, 1944, the defendant falsely and maliciously spoke and published of the plaintiff to Dorothy H. M. McIntosh and other neighbours the following words :—"The plaintiff when entrusted with the keys of the houses up "the road used them for the purpose of prying into their "rooms, cupboards and personal effects," and that by these words the defendant meant that whilst the plaintiff was engaged in and carrying out firewatching duties, she had abused her position and had committed a criminal offence. There was no allegation of special damage. The defendant pleaded that she did not speak the words alleged ; that they did not bear and were not capable of bearing the meaning alleged ; that the words were not actionable without proof of special damage and the words, if uttered, were words of heat, spoken in anger. At the trial counsel for the plaintiff abandoned the contention that the words meant that the plaintiff had committed a criminal offence.

L. Freedman for plaintiff.

R. T. Paget for defendant.

At the conclusion of the plaintiff's case.

R. T. Paget : My submission is that there is no case for the defendant to answer on the ground that the words are not actionable without proof of special damage, and I submit that the defendant is entitled to a ruling on that issue at this stage : *Parry* v. *Aluminium Corporation, Ld.*, per Goddard L.J. (1).

CROOM-JOHNSON J. : I shall postpone my ruling if evidence is being called for the defendant.

(1) (1940) 162 L. T. 236, 237.

Evidence was then called for the defendant.

R. T. Paget for the defendant : Firewatching is a mere duty which is obligatory on the majority of citizens and not an office which, as opposed to one of profit, is described as of honour or credit. Lord Herschell said in *Alexander* v. *Jenkins* (1) that where the allegation is of unfitness for an office not of profit, the action will not lie unless the conduct charged be such as would enable the plaintiff to be deprived of that office. The imputation here is not one which, were it true, would cause the plaintiff to be removed as a firewatcher. Indeed I have not discovered any power to remove a firewatcher.

L. Freedman for plaintiff : Parish constables had an office which was obligatory and honorary. Firewatchers in the same way hold an office not of profit, but of honour and credit. The words used by the defendant alleged misconduct in an office, so that the observation of Lord Herschell in *Alexander* v. *Jenkins* (1) is not in point. [*Booth* v. *Arnold* (2) was also referred to.]

CROOM-JOHNSON J. found that the words complained of in the statement of claim were uttered by the defendant and published to Dorothy H. M. McIntosh, and that though they were uttered in anger, they were not mere words of heat and vulgar abuse, and continued : It has been contended for the plaintiff that these words were spoken of her in respect of her office as a firewatcher and touching her in that office. The question then arises : has the plaintiff any such office ? No evidence has been called by the plaintiff to show that there is an office of firewatching. Had the words been spoken of the plaintiff as an air raid warden, the possibility of that occupation being an office would have had to be considered. My attention has been called to the passage in Lord Herschell's judgment in *Alexander* v. *Jenkins* (1) : " Where the imputation is an imputation, not of misconduct " in an office, but of unfitness for an office, and the office " for which the person is said to be unfit is not an office " of profit, but one merely of what has been called honour " or credit, the action will not lie, unless the conduct charged " be such as would enable him to be removed from or deprived " of that office." But if the occupation of firewatching were an office, the allegation here is of social misconduct in the

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(1) [1892] 1 Q. B. 797, 802.

(2) [1895] 1 Q. B. 571.

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office and not one of unfitness for the office, of which Lord Herschell was speaking. I do not myself see how that makes any difference, for it is plain that for a firewatcher to use his powers with the custody of keys to pry into his neighbours' affairs, although not misconduct for which a firewatcher could be prosecuted or even, perhaps, sued, it would be a serious ground of complaint. The definition of the verb "to pry" in the smaller Oxford Dictionary is: "to look, "esp. to look closely or curiously: to peer inquisitively "or impertinently, to spy." Firewatching is a duty which since the date of the Fire-Guard (Local Authority Services) Order, 1943, has been imposed on the great majority of citizens, I cannot see that firewatching is anything other than a duty or that there exists any office of firewatching from which a person is removable. Mr. Paget told me that he was unable to find in the delegated legislation any power to remove a firewatcher. If there is no power of removal, how can it be said that conduct of the nature alleged makes the plaintiff removable from the duty of firewatching? Accordingly, I do not think that these words were spoken of the plaintiff in her office of firewatcher, since there is no such office. I am bound, therefore, to give effect to the plea in the defence that the words alleged are not actionable without proof of special damage. The action, therefore, fails.

I must add a word on a point of practice. Mr. Paget for the defendant, at the conclusion of the case for the plaintiff, submitted that there was no case, on the ground that there was no allegation or proof of special damage, and that he was entitled to have my ruling on that issue at that stage of the proceedings, before any evidence had been called for the defendant. He referred to *Parry* v. *Aluminium Corporation, Ld.* (1), where Goddard L.J., dealing with the modern practice after a submission of no case, of calling on defendant's counsel to elect whether he will call evidence or not, said (2): "I do not say that it is the right course in every kind of "action, because in defamation cases, for instance, I believe "there is authority for saying that, if it is submitted "that there is no evidence of malice, the judge is bound to "rule. Also in slander cases the judge must rule if the "submission is made that the words are not actionable without "proof of special damage and no special damage is alleged." In making those observations, I doubt whether the learned

(1) 162 L. T. 236.

(2) Ibid. 237.

lord justice had visualized a case like the present, where all the evidence had to be heard in order that the court might ascertain whether the plaintiff held any office, to see whether or not the rule as to the necessity of proving special damage applied. I say nothing about the observation of the lord justice as to the case where it is submitted that there is no evidence of malice, although it may well be that, when privilege is pleaded, evidence of malice may be found from the demeanour of the defendant in the witness box. Counsel informed me that he had not found the authorities to which Goddard L.J. referred. I do not know of them myself, though, until the date in recent years when the rule was laid down about the practice on submission of no case, it was common for counsel for the defendant to submit in an action for libel or slander, at the conclusion of the plaintiff's case, that he had no case to answer, and to obtain a ruling then and there, although the reply from the bench was often: "I shall "not rule now; I shall wait until the conclusion of the case." That is the course I have pursued here. With every respect for the passage cited to me from the judgment of Goddard L.J., I did not feel bound to rule then and there on the submission there made to me at the conclusion of the plaintiff's case. I thought it right that I should hear all the evidence, so that the parties when they left the court might feel that the whole of their dispute had been dealt with. There must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Lattey & Dawe.*
Solicitors for defendant: *Langlois, Harding, Tate & Johnson.*

C. G. M.

HILL v. REGEM.

1945
Feb. 28; *Mar.* 1.
Humphreys J.

Emergency legislation—War damage—Business scheme insurance—Account books—"Goods"—"Documents owned for the purposes "of a business"—War Damage Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 83, *sub-s.* 1; *s.* 84, *sub-ss.* 1 *and* 4; *ss.* 85 *and* 104.

Account books, such as journals and ledgers, used by an insurance broker in his business, are "documents owned for the "purposes of a business," within the meaning of the proviso to

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s. 104 of the War Damage Act, 1943, and so excluded from insurance under the " business scheme " operated by the Board of Trade by virtue of s. 83 of the Act.

PETITION OF RIGHT tried by Humphreys J.

The suppliant was an insurance broker carrying on business at 6, Lloyd's Avenue, London, E.C. The contents of those premises, including thirty-three accounts or record books used by the suppliant for the purposes of his business, were destroyed on December 29, 1940, by enemy action, i.e., by war damage within the meaning of s. 2, sub-s. 1, of the War Damage Act, 1943. One of the books was a " large daily " brokering journal covering all brokering transactions, com- " piled from documents, having reference to each trans- " action," and the rest consisted of ledgers and journals relating to the suppliant's business and clients. Before the present war, these books had been insured for the sum of approximately 3,000*l.* The suppliant, under the discretionary powers granted to the Board of Trade under s. 85 of the Act, was deemed to be insured under the " business scheme " operated by the Board of Trade at the time of the damage (see s. 83, sub-s. 1 (*a*) of the Act (1)). By his petition the suppliant claimed that these account books were insurable under the business scheme as being " goods situated in the " United Kingdom which are in his possession . . . . and are " held or used by him wholly or mainly for the purposes of " that business," within the meaning of s. 84, sub-s. 1, of the Act (1). The answer of the Crown was that the petition was

(1) War Damage Act, 1943, s. 83: (1.) " The Board of Trade " may operate two insurance " schemes . . . . that is to say— " (*a*) a scheme, in this Part of this " Act referred to as ' the business " ' scheme,' whereby the Board " undertake the liability of in- " suring persons carrying on " business against war damage to " the goods specified in the next " succeeding section as being goods " which, in relation to those " persons respectively, are insur- " able under the business scheme ; " . . . ."

Section 84: (1.) " Subject to " the provisions of sub-s. (4.) of this " section, the goods insurable under " the business scheme in relation " to any person carrying on " business are all goods situated in " the United Kingdom—(*a*) which " are in his possession (whether he " owns them or not) and are held " or used by him wholly or mainly " for the purposes of that business " . . . . (4.) The following goods " shall not, in relation to any " person be insurable under either " of the schemes :—(*a*) any goods " as respects which that person is, " or could be, insured under " Part II of the War Risks Insur- " ance Act, 1939 ; . . . ."

Section 104: " In this Act, " unless the context otherwise " requires, the expression ' goods ' bad in substance and in law, in that the books were not "goods," but were "documents owned for the purposes of "the suppliant's business," within the meaning of the proviso to s. 104 of the Act (1).

Pritt K.C. and *Devlin* for suppliant: These account books undoubtedly were "corporeal property" within the meaning of s. 104, but, although owned for the purposes of a business, they were not "documents." Accordingly they were "goods," insurable under the business scheme operated by the Board of Trade. Had the legislature desired to exclude books of account from this insurance, it would have been easy to say so. By s. 87, sub-s. 1, of the Act, a person authorized by the Board of Trade may enter the premises of any person carrying on business and may request the production of "accounts, "books, and other documents." If the contention of the Crown is correct the suppliant's press-cutting book and his Hansard are "documents" owned for the purposes of his business and so excluded from insurance, and in the case of the London Library all their millions of books would be excluded. Section 104 must be considered from the point of view of an educated business man, who would not consider a book to be a document. The business scheme does not insure the stock of a man carrying on business (see s. 84, sub-s. 4, of the Act of 1943, and s. 7, in Part II. of the War Risks Insurance Act, 1939). It insures his apparatus for carrying on business, and a valuable part of that apparatus consists of his books of account. The Crown is seeking to exclude these books from insurance under the business scheme by reason of the proviso to s. 104, and the onus, therefore, is on the Crown to satisfy the court that they must be excluded. The Crown must find in the terms of the proviso a reason for excluding account books from this insurance which would appeal to the ordinary business mind.

Sir David Maxwell Fyfe S.-G. and *Valentine Holmes* for the Crown: In the Oxford English Dictionary the first

"includes all corporeal property" (not falling within the meaning assigned to the expression "land" by s. 103, nor deemed for the purposes of s. 71, to form part of a highway): "Provided that the "said expression does not include "money, negotiable instruments, "securities for money, evidences "of title to any property or right "or of the discharge of any "obligation, or any documents "owned for the purposes of a "business."

three meanings of the word "document" are noted as obsolete. The fourth and last meaning given is: "Something "written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, tomb-"stone, coin, picture, etc." These account books were "documents" within the meaning of that word in the proviso to s. 104. All the categories included in the proviso as excepted from insurance are evidential—evidence of something else. "Money," "negotiable instruments" and "securities "for money" afford evidence of rights. Then follow the words: "evidences of title to any property or right or of the "discharge of any obligation" and lastly "documents owned "for the purposes of a business," i.e., something written furnishing evidence or information for the purposes of a business. It is clear that this category includes account books. [They referred to *Carew* v. *Carew* (1), *Rex* v. *Daye* (2), and *In the Matter of an Application for a Patent by Alderton and Barry* (3).]

Pritt K.C. replied.

HUMPHREYS J. The short question which I am asked to decide is, are these books of account "documents owned "for the purposes of a business," within the meaning of the proviso to s. 104 of the War Damage Act, 1943? They are undoubtedly "corporeal property" within the meaning of the section, but if they are such "documents" they are expressly excluded from the business scheme under which the suppliant was presumed to be insured. Since the Crown is seeking to exclude them from insurance by reason of the proviso, the onus is on the Crown to satisfy me that they must be excluded. Although the construction of an Act of Parliament must always be a question of law, I agree with Mr. Pritt that where the construction involves the right meaning to be given to a word in such common use in business as the word "document"—a word of which every-one thinks he knows the meaning—the court should endeavour to give to it a meaning with which the ordinary educated business man would agree. Whether I regard the derivation of the word "document" from Latin, or the decisions of the courts on the meaning of the word, I find that a document must be

(1) [1891] P. 360.
(2) [1908] 2 K. B. 333.
(3) (1941) 59 R. P. C. 56.

something which teaches you and from which you can learn something, i.e., it must be something which affords information. In the dictionaries the word is repeatedly defined as something which is " evidence," not in the sense that it is something admissible in a court of law, but as being something which makes evident that which otherwise would not be evident. To constitute a document, the form which it takes seems to me to be immaterial; it may be anything on which the information is written or inscribed—paper, parchment, stone or metal.

In Stroud's Judicial Dictionary (2nd ed.) the first words which I find on the meaning of " document " are: "a ledger, " including a partnership ledger, is a document within r. 191, " Divorce Court Rules," and the reference is to *Carew* v. *Carew* (1). That case is not an authority for that proposition, but it was assumed by the parties that the ledger in that case was a " document " within the meaning of r. 191: " If he " (the registrar) thinks fit he shall be at liberty to require the " attendance of the husband, for the purpose of being " examined or cross-examined, and to take the oral evidence " of witnesses, and to require the production of any document " . . . ." The petitioner, a wife, made an application for alimony pendente lite. The registrar issued a subpœna duces tecum directing the respondent, the husband, and his partner, to produce their books. They produced a ledger relating to the last year's business, but refused to allow it to be inspected. The registrar made an order granting inspection of the ledger, but the respondent and his partner failed to comply with the order and the petitioner moved for their attachment. But counsel, it seems, did not think it even arguable that the word " document " in the rule did not include the ledger. In *Rex* v. *Daye* (2) a sealed packet deposited in the joint names of two parties with a banker, and alleged to contain a formula for making diamonds, was held to be a " document " and, therefore, liable to production on a subpœna duces tecum. Darling J. said (3): " On behalf of the bank, it has been con- " tended that the sealed envelope, and what is inside it, does not " come within the term ' document.' I think that it is perfectly " plain that the sealed envelope itself might be a document. " Nothing but the sealed envelope might be required. But " I should myself say that any written thing capable of being " evidence is properly described as a document and that it is

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(1) [1891] P. 360.

(2) [1908] 2 K. B. 333.

(3) Ibid. p. 340.

"immaterial on what the writing may be inscribed. It "might be inscribed on paper, as is the common case now; "but the common case once was that it was not on paper, but "on parchment; and long before that it was on stone, marble "or clay, and, it might be and often was, on metal. So I should "desire to guard myself against being supposed to assent to "the argument that a thing is not a document unless it be a "paper writing. I should say it is a document no matter on "what material it be, provided it is writing or printing and "capable of being evidence." The following words might have been added to this passage, as I have indicated: "in "that it furnishes information." That decision was dealing with the terms of a different statute, but I agree with the decision and with the judgment of Darling J. Morton J., in *In the Matter of an Application for a Patent by Alderton and Barry* (1), expressed doubt whether cards which by means of a machine would give information as to the time a workman clocked in or out, before they had been so used, were documents within the meaning of s. 11, sub-s. 1 (*b*), of the Patents and Designs Acts, 1907 to 1939, since they did not convey any information to any-one at that time. The same point might be taken about an apparently blank piece of paper, that it is not a document, but once secret writing has been developed on it then it might properly be described as a document.

The Solicitor-General agreed with the view expressed by Mr. Pritt that the court should endeavour to find in this proviso some reason which would appeal to the ordinary business mind, why there should be excluded from this business scheme, operated by the Board of Trade, a man's account books owned for the purposes of his business, and he contended that this appeared from a close examination of the exceptions in the proviso to s. 104. The Solicitor-General contended that all the categories excluded from this insurance were evidential—evidence of something else. I doubt whether that is the true explanation of the exclusion of money from the scheme. I do not think that the possession of a pound note is evidence that you have got anything at all. Money is currency, and because it is currency, is goods, which term includes all corporeal property. In one sense it is true to say that there is no such thing as money in these days. A one-pound note is an unconditional promise by the Bank of England to pay 1*l.* to the bearer. If you take it to that bank you will get in exchange for it nothing, except another unconditional promise to pay 1*l*. You will not get anything for it of intrinsic value. I do not think the word " money " is evidence of anything at all. There is a much better reason, in my view, for excluding money from this scheme of insurance. It has been the practice of insurance companies in the case of household insurance against burglary, theft and fire to exclude money and cash, except, sometimes, to a very small amount. No insurance company will grant a household policy for 10,000*l*. covering 9,000*l*. cash kept in the house, since there is no way of ascertaining whether there was 9,000*l*. in cash in the house before the event of the theft or the fire. The Board of Trade were not called on to insure under this scheme against the loss of thousands of pounds in cash, and so money was excluded from this business scheme of insurance. Then follow in the proviso the words " negotiable instruments " and " securities " for money "—the equivalent of money. But the words, " evidences of title to any property or right or of the discharge " of any obligation " are consonant with the argument of the Solicitor-General, and then follow the last words: " any " documents owned for the purposes of a business." The Board of Trade are not insuring under the business scheme the stock of a trader (see s. 84, sub-s. 4, of the War Damage Act, 1943, and s. 7 of the War Risks Insurance Act, 1939), since that is insurable otherwise. By this scheme the Board of Trade are insuring the means by which a man carries on his business—his apparatus. What then is the position of his account books? They consist of information as to business done and of business expected to be done personal to the man carrying on the business. They are his own notes: his own records. They have no effect on any other person. That is an understandable reason for the Board of Trade not being called on to insure account books, and they have not been so called on, as I have said, by excluding from this scheme of business insurance " any documents owned for the purposes " of a business."

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(1) 59 R. P. C. 56.

Petition dismissed.

Solicitors for suppliant: *Edward & Childs.*
Solicitor for Crown: *The Solicitor, Board of Trade.*

C. G. M.

C. A.

1945

Feb. 22, 23; *Mar.* 8.

Scott, Lawrence and Morton L.JJ

BIRD *v.* BRITISH CELANESE, LIMITED.

Master and servant—Oral contract of employment—Implied term—Practice at works—Suspension of workman for misconduct—Refusal of workman to obey orders—Non-payment of wages—Whether breach of Truck Act—Truck Act, 1896 (59 & 60 *Vict., c.* 44), *s.* 1.

An oral contract of employment contained as one of its terms a practice at the employer's works that the workman could be temporarily suspended from his employment if he was guilty of misconduct or breach of an order. A workman who had been suspended for two days without pay sued his employers to recover damages or wages for the two-day suspension:—

Held, that a contract of employment whereby the workman might be suspended if he were guilty of misconduct was not a contract for any deduction from the sum contracted to be paid within the meaning of s. 1 of the Truck Act, as by the terms of such a contract the employer never contracted to pay wages to the workman during the period of suspension.

Appeal from Long Eaton county court.

The plaintiff, Bird, was a spinner in the employ of the defendants, British Celanese, Ld. The contract of employment was oral, although it included the acceptance of various internal rules for work and behaviour, some of which were posted up as printed rules while others were practices in the defendants' works regularly enforced or followed. The contract was terminable on either side by one day's notice. The material term of the contract in the present case was a practice that for various transgressions, including refusal to obey an order, the employers were entitled "temporarily to "suspend the workman from his employment", the wording of the recognized practice being, "if he was guilty of mis-"conduct or breach of duty or breach of an order." The county court judge held that this term was well known to the plaintiff, and that it was a term of his employment. It was the plaintiff's duty to take his share in cleaning the fixed part of the machine before leaving at the end of the shift. On January 3, 1944, the plaintiff informed the foreman that he refused to do the cleaning of the machine, and he was therefore suspended for a day. The same thing happened on the next day. On January 5 he said that he would obey the order and was therefore allowed to resume his place in the shift. The plaintiff thereafter brought the present action, in which he claimed 2*l.* 10*s.* 0*d.* as damages or alternatively as wages in respect of the two days, January 3 and 4, 1944, when he was suspended.

The county court judge held that the refusal to obey the order to clean the machine amounted to serious misconduct, but that the enforcement of the suspension of the plaintiff for two days by the non-payment of wages was rendered illegal by s. 1 of the Truck Act, 1896 (1). He accordingly gave judgment for the plaintiff for 2*l.* 10*s.* 0*d.* as damages. The defendants appealed.

R. O'Sullivan K.C., *A. J. Flint* and *C. G. Bonard* for the defendants. Both under the ordinary law and under cl. 4 (3.) of the Essential Work (General Provisions) (No. 2) Order, 1942, suspension involves loss of wages for the period of suspension. Apart from contract there would be no right to suspend, but the county court judge found that a right to suspend was part of the contract of employment. Under the Essential Work Order the workman was only entitled to wages if "capable of and available for work" (cl. 4 (1.) (*d*) (i.)), and the county court judge found that he was not. A contract which recognizes the right of an employer to suspend a workman, and consequently to withhold wages from him, is not "a contract . . . . for or in respect of any fine" within the meaning of s. 1, sub-s. 1, of the Truck Act, 1896. A fine is the taking away from the workman money that he has, while here money is withheld from him. In the present case the employers never contracted to pay wages to the workmen during the period of suspension, and therefore the contract was not a contract for any deduction from the sum contracted to be paid.

R. T. Paget and *Boswell* for the plaintiff. The contract that the employers should have power to suspend was illegal under s. 1, sub-s. 1, of the Truck Act, 1896, as involving a deduction "from the sum contracted to be paid," i.e., the wages of the workman. That means to fine the workman—see per Atkin J. in *Hanley* v. *Pease & Partners, Ld.* (2). The result to the workman is the same, whether it is called a fine or a stoppage of wages. Suspension does not necessarily involve stoppage of wages. The employers may have had the right to discharge the workman, but they elected to treat the contract of employment as continuing, and instead of exercising any right to claim damages against him, they stopped his wages under the above illegal contract. They had no right to do this, and thus fine him—per Lush J. in *Hanley's* case (1). While the relation of employer and workman exists the latter is entitled to wages whether he works or not. *Pritchard* v. *James Clay* (*Wellington*), *Ld.* (2), shows the wide interpretation put on the words "deduction from the sum contracted to be paid" in s. 1, sub-s. 1, of this Act. [*Haslam* v. *Selby Mill, Ld.* (3) was also referred to.] The Essential Work Order does not provide the workman with a right to the wages to which he is entitled under his contract of employment, but with a right to be paid a normal wage—see *George* v. *Mitchell* (4). The workman had a contractual right to be paid his wages while he was in the defendants' employment. The employers refused to pay his wages, and therefore the plaintiff is entitled at least to nominal damages. A term of the contract of employment that entitles the employers to refuse to pay the workman wages during the period of suspension would be contrary to the Truck Act, 1896, and therefore illegal and not binding. A man who is absent from his work through illness is nevertheless entitled to his wages—see *Marrison* v. *Bell* (5). A man suspended for smoking would in reality be fined for smoking; he would be ready and willing to work and would therefore be entitled to his wages under his contract of employment. To suspend a man for one day is in reality to impose a penalty upon him and is therefore contrary to the provisions of the Truck Act.

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(1) Truck Act, 1896, s. 1, sub-s. 1: "An employer shall not "make any contract with any "workman for any deduction "from the sum contracted to be "paid by the employer to the "workman, or for any payment to "the employer by the workman, "for or in respect of any fine."

(2) [1915] 1 K. B. 698, 706.

O'Sullivan K.C. in reply. The report of *Marrison* v. *Bell* (5) was commented upon in *Petrie* v. *MacFisheries, Ld.* (6) and *O'Grady* v. *M. Saper, Ld.* (7). There is no general principle of law that in every case a servant is entitled to wages during temporary absence through sickness. Lord Sterndale M.R., in *Wallwork* v. *Fielding* (8) pointed out that "power to suspend "the operation of a contract necessarily suspended its whole "operation including not only the performance of duty but "also the right to pay during the period of suspension," and

(1) [1915] 1 K. B. 705.
(2) [1926] 1 K. B. 238.
(3) 1935 2 L. J. N. C. C. R. 13, 15.
(4) [1943] 1 All E. R. 233, 237.
(5) [1939] 2 K. B. 187.
(6) [1940] 1 K. B. 258, 261, 269.
(7) [1940] 2 K. B. 469, 473.
(8) [1922] 2 K. B. 66, 71, 72.

later he said : " The contract is suspended with regard to its " performance by both sides, not only by one." The same view was expressed by Warrington L.J.

Cur. adv. vult.

Mar. 8. The following judgments were read :

SCOTT L.J. : The defendant company carried on a very large undertaking where over 10,000 men were employed. It was scheduled pursuant to the Essential Work (General Provisions) No. 2 Order of 1942, made by the Minister of Labour and National Service under the powers of Defence Regulation 58A, and, therefore, having statutory force. The plaintiff was a workman in the defendants' employ. By his particulars of claim he claimed *2l.* 10*s.* 0*d.* as damages, or, alternatively, as wages, in respect of two days, January 3 and 4, 1944. On each of those days he had been suspended from employment by the defendants pursuant to a term of his contract with them, on the ground that at the beginning of the shift on each day he had refused to obey an order given him by a superior servant of the company. This suspension the company was entitled to impose under a term of the contract of employment, if the enforcement of the term was not prohibited by statute. On the facts as found by the county court judge I think the only question of law for us to decide is whether the sanction of non-payment of his daily wage for those two days, consequent on the " suspension," was, in the circumstances of the case, made illegal by s. 1 of the Truck Act, 1896. The learned judge held that it was ; that the right of suspension without wages was for that reason inoperative ; and that consequently the company had itself broken its contract of employment and was liable in damages. He held that the right to wages did not remain effective, and, therefore, gave judgment, not for *2l.* 10*s.* 0*d.* for the two days' wages, but for a like sum as damages. The point of law under the Truck Act was not raised in the pleadings ; but if, on the facts before him, the enforcement of the term of the contract was forbidden by statute, it was his duty to take the point : *Gedge* v. *Royal Exchange Assurance Corporation* (1). [The learned lord justice stated the facts found by the county court judge and continued] : The material term on which the present dispute turns was, that, for various transgressions, including refusal to obey an order, the employer was entitled "temporarily to suspend the workman from his "employment", the wording of the recognized practice being, "if he was guilty of misconduct or breach of duty or "breach of an order." That term was held by the learned judge to have been well known to the plaintiff as a practice of the works, and he held it to be a term of the man's contract of employment. On the evidence he could not have held otherwise. He also held that the defendant company had always applied that right reasonably. The very nature of the right shows that its object is, on the one hand, to enforce discipline by a reasonable exercise of pressure, and, on the other, to relieve both employer and workman of the burden of actual dismissal, by the agreed substitution of a milder sanction. We were informed that both sides in the rayon industry—employers and trades unions—regarded the case as of great importance, and the learned judge gave a considered judgment in favour of the workman because of his interpretation of the Truck Act.

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(1) [1900] 2 Q. B. 214.

The one question in the appeal is the true meaning of the Truck Act; and that depends solely on the proper interpretation of s. 1 of the Act of 1896. For this purpose I assume, with the learned judge, that the order was a proper order: and that the right to suspend for a refusal to obey it was a term of the contract of employment. The consequences of the suspension, namely, the agreed absence of any right to receive, or duty to pay wages during the suspension, does not, in my opinion, come within the ambit of s. 1, which reads as follows: "An employer shall not make any contract with any workman "for any deduction from the sum contracted to be paid by the "employer to the workman, or for any payment to the "employer by the workman, for or in respect of any fine, "unless" certain conditions are fulfilled. Of these one at least—an exhibited notice or signed contract containing the suspense clause—was not fulfilled; therefore, if the learned judge's interpretation were right, the result of illegality would follow; for the "suspension" term was clearly, as the learned judge said, a "contract" within the definition in s. 25 of the Truck Act, 1831, with which the Act of 1896 is to be read as one, but I think that he misconstrued the enacting words at the commencement of the section. There are only two types of contractual stipulation within the provisional prohibition—(1.) deductions from wages; and (2.) payments made by the workman unconnected with his wages. Both are, I think, qualified by the last seven words " for or in respect " of a fine." Those words are an essential limitation on both prohibitions, because without that limitation all deductions from wages, and also all payments by the workman out of his own pocket would be brought within the ban—for example, subscription to a pension or welfare or sports fund. It is quite clear that the " suspense " clause in the particular contract of employment before the court is not within the second category of prohibited stipulations : no payment by the workman was called for by it. Is it within the first ? Clearly not, because you cannot deduct something from nothing. The suspense clause may act in two ways. It may be a merciful substitute for the procedure of dismissal, and a possible re-engagement. Under the suspense clause the right to wages ceases and the wages are not earned, and no deduction can be made from wages which are not payable. In the present case, as the workman was adjudged guilty of serious misconduct, the operation of the clause was merely merciful. It enabled the workman, when the suspension ended, to claim as of right to continue in his old job. The clause operates in accordance with its terms ; the whole contract is suspended, in the sense that the operation of the mutual obligations of both parties is suspended ; the workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay. That is the natural meaning of the word " suspend " when applied to a contract of employment, and I think it is also its legal meaning. If so, this suspense clause is not obnoxious to the veto of s. 1 of the Act. It was suggested in argument that the words " for or in respect " of a fine " should be read as applying only to the second limb of the prohibition, and not to deductions from wages. I do not think that is the right construction. It applies to both limbs. My interpretation is strongly supported by a comparison of ss. 2 and 3 with their parallel provisions and language. Those two sections forbid two specific types of deduction from wages ; they would both have been superfluous if s. 1 had contained a general prohibition of all types of deductions from wages. Under all three sections the deduction is from wages which have been earned under the contract and for which the employer is under a present duty to make payment. In this sense the deductions from wages under s. 1 are generically similar to those under ss. 2 and 3, for in all three cases the deductions are from wages earned and payable in accordance with the terms of the contract : on the other hand, where there is a suspension in accordance with the terms of the contract, there are no wages so to become payable. For these reasons I think the Truck Act veto is inapplicable, and the appeal must be allowed, with costs here and below.

LAWRENCE L.J. (read by MORTON L.J.) : I agree. The county court judge has found in this case that the employers and the plaintiff, a workman, contracted upon the terms that their contract might be suspended if the workman was guilty of misconduct and that the workman had been so guilty, but he held that such a contract infringed s. 1 of the Truck Act, 1896. The question is, therefore, whether such a contract is a contract for any deduction from the sum contracted to be paid for or in respect of a fine within the meaning of s. 1 of the Truck Act. In my opinion, it is not. Apart from the Truck Act there is nothing in law or in fact which prevents two contracting parties contracting on the terms that either during holidays or illness, or any other period, the obligations of the contract shall be suspended. By the terms of such a contract the contracting party, if he be an employer, never contracts to pay wages during the period referred to, any more than the other party, if he be a workman, contracts to work during that period. That is the meaning of suspension (see per Lord Sterndale M.R. and Warrington L.J. in *Wallwork* v. *Fielding* (1), and there can be no doubt such a result can be achieved by agreement. It follows, in my opinion, that such a contract is not a contract for any deduction from the sum contracted to be paid, since no sum was ever contracted to be paid during a period of suspension. Counsel for the plaintiff attempted to argue that the plaintiff had been given orders which conflicted with the employers' rules, which formed part of his contract, but such an argument was, in my view, not open to him on this appeal, not having been raised in the pleadings, being inconsistent with the judge's findings of fact, and evidence on such an issue having been excluded by the judge.

MORTON L.J. : As I read the judgment of the learned county court judge in this case, he declined to consider the question whether the order which the workman refused to obey infringed the provisions of the Factory Acts ; and he also declined to consider the question whether that order infringed

(1) [1922] 2 K. B. 66, 72, 74.

the rules laid down by the employers for the safety of their workers. In my view, the judge was right in so declining. These questions could only have been relevant if the issue of misconduct or no misconduct by the workman had been before the judge, and the workman's solicitor, at the outset of the hearing in the county court, stated that the issue of the workman's misconduct was "not now down for consideration" and later admitted, in effect, that the workman had been guilty of misconduct. Further, it is not disputed before this court that the contract between the workman and the employers contained a term enabling the employers to suspend the workman from his employment if he were guilty of misconduct. It follows, in my view, that the only question with which this court is concerned is whether this term of the contract does or does not infringe the provisions of s. 1 of the Truck Act, 1896. In my view it does not, and I do not desire to add anything to the reasons already given by my brethren. The observations of Atkin J. (as he then was) in *Hanley* v. *Pease & Partners, Ld.* (1) were relied on by counsel for the workman, but these observations contain no expression of any opinion. I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for plaintiff: *C. Leslie Hale, Burton-on-Trent.*

Solicitors for defendants: *B. P. Webster, for Flint, Bishop & Barnett, Derby.*

R. F. S.

(1) [1915] 1 K. B. 698, 706.

HECTOR STEAMSHIP COMPANY *v.* V. O. SOVFRACHT, MOSCOW.

1945
Feb. 21, 22.
Atkinson J.

Shipping—Charterparty—Time-charter—Re-delivery of vessel—Construction—"Should steamer be ordered on a voyage by which the "charter period will be exceeded"—Rate of hire.

A time charterparty provided by cl. 6: "Steamer to be "re-delivered on expiration of this charter . . . . should steamer "be ordered on a voyage by which the charter period will be "exceeded, charterers to have the use of the steamer to enable "them to complete the voyage, but for any time exceeding "termination date, charterers to pay market rate, if higher than

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HECTOR STEAMSHIP CO. *v.* V. O. SOVFRACHT, MOSCOW.

"rate stipulated herein." The steamer was ordered on a voyage which it was reasonable at the time of the order to conclude would be completed within the charter period. In fact, owing to events for which the charterers were found not to be responsible, the steamer was only re-delivered to her owners long after the expiration of the charter period. The market rate of hire was higher than the charter-rate during the period of the voyage after the expiration of the charter period :—

Held, that cl. 6, dealt with what, apart from that clause, would of necessity, be a breach of the charterparty, i.e., the ordering of a voyage by the charterers which could not reasonably be expected to be completed within the charter period. Accordingly, it was inapplicable to the facts of this case. The ordering of a voyage which could reasonably be expected to be completed within the charter period was not a breach of the charterparty and the charterers were only liable for the charter rate of hire until the date of redelivery of the steamer.

AWARD stated in the form of a special case under s. 9 of the Arbitration Act, 1934, in a claim for hire by shipowners under a charterparty.

On June 1, 1939, the Hector Steamship Company, owners of the s.s. *Alex*, chartered her to V. O. Sovfracht, Moscow, by a charterparty containing the following clauses: 1. "Owners agree to let and charterers agree to hire steamer "for a period of about three calendar months from the time ". . . . the steamer is delivered and placed at the disposal "of the charterers . . . . not before June 5, 1939 . . . ." Clause 5. "Charterers to pay 3*s.* 9*d.* per ton deadweight per "calendar month or pro rata commencing in accordance "with cl. 1, until re-delivery to owners." Clause 6. "Steamer "to be redelivered on expiration of this charter . . . . in "charterers' option, in the United Kingdom or on the "continent, between Bordeaux and Hamburg both inclusive. "Charterers to give owners not less than seven days' notice "at which port and about which day steamer will be "redelivered . . . . Should steamer be ordered on a voyage "by which the charter period will be exceeded, charterers "to have the use of the steamer to enable them to complete "the voyage (. . . .), but for any time exceeding termination "date charterers to pay market rate if higher than rate "stipulated herein." [In the original form of charterparty there had appeared, where indicated in cl. 6 by brackets, the following words, which were deleted: "provided it could "be reasonably calculated that the voyage would allow "redelivery about time fixed for the termination of the "charter."] Clause 25. "It is understood that the period "'about' is to read 'not exceeding ten days'." Clause 34. "Charterers have the option of continuing this charter for "a further period of about one month, option one further "month, on giving owners five days' notice before the "expiration of the third or fourth month in each case."

The vessel was duly delivered on June 7, 1939. On September 1, when the vessel was at Archangel, the following written and telegraphic notice was given by the charterers to the owners: "*Alex* according to cl. 34 time charter will use "option one month. Confirm." On September 4 the owners telegraphed, noting the option. Loading was completed on September 4, when a bill of lading was issued by the terms of which the vessel was to proceed to Rotterdam or Velzen in Holland. The vessel was delayed in sailing until September 22, and arrived at Narvik on September 29, where she awaited a convoy in which she sailed on October 28, arriving on November 2 in the Tyne, where she remained until December 8, when she sailed for Holland, being finally redelivered to the owners on December 16, 1939.

Two questions were raised by the case: (*a*) what was the date on which the charter period ended—October 17 or 27?; (*b*) was hire, for the time after the charter period ended, payable at the charter rate or the market rate? The umpire decided that having regard to cl. 25 the charter period, after the exercise of the option, was extended to October 27. The second point depended on the construction of the last paragraph of cl. 6. The owners contended that the words "will be "exceeded" meant "is exceeded" and in support of that construction they claimed that the tribunal was entitled to take into account the deleted words. The charterers contended that the deleted words could not be considered and that the words "will be exceeded" related to the time at which the voyage was ordered. It was conceded by the owners that if their construction were wrong, the charterparty rate would apply throughout. The umpire found that at the date when the voyage was ordered, September 4, the day on which the bill of lading was issued, it was reasonable to conclude that it would be completed by October 17, and he held that he was not entitled to look at the deleted words; that the last paragraph of cl. 6 never came into operation, since the steamer was not ordered on a voyage by which the charter period would be exceeded; and that the hire for the time in excess of the charter period should be paid for at the charterparty rate.

1945

Hector Steamship Co. v. V. O. Sovfracht, Moscow.

Sir Robert Aske K.C. and *A. J. Hodgson* for owners stated that he must concede that the deleted words in cl. 6 could not be considered so far as a court of first instance was concerned.

Devlin for charterers.

Atkinson J. Both parties approach the construction of cl. 6 by a consideration of the position in law if there had been no such clause in the charterparty. In *Gray and Co.* v. *Christie and Co.*, Mathew J. said (1): "Looking at the terms, "it was true that it was a time charter, but it was also a "voyage charter, and it could not have been in the contemplation of the parties to do anything so unbusinesslike as to "make it a breach of the charterparty to send the steamer on "a voyage which could not be completed by the" due date. Atkin J. in *Watson Steamship Co.* v. *Merryweather and Co.* said (2): "Under a charterparty of this kind the general "position is that in the absence of an express provision the "parties are not bound to regard the period for terminating "the contract as a time which is of the essence of the contract "but that the exigencies of maritime business demand that "the charterers should have a reasonable time within which, "the hire shall continue after the date fixed for redelivery; "in other words, it is contemplated that the ship shall go on "a succession of voyages, and as it is impossible to arrange "that the last voyage shall end precisely at the date mentioned, "the document must be construed reasonably, and it would "not be a breach of the contract if the ship were redelivered "within a reasonable time afterwards, if it was the case that "she was on a voyage on which she was reasonably sent "during the subsistence of the contract."

Of course, time may be made of the essence of the contract, and, when it is so made, the charterer must not order a voyage which cannot reasonably be expected to be completed by the fixed date. But clearly, on the same principle as that enunciated in the two cases to which I have referred, the charterer must be entitled to order a voyage which can reasonably be expected to be completed within the contract period, and in so doing he is not guilty of a breach. If, in fact, the ship does not arrive within the time reasonably expected, and not until after the expiration of the contract period, it does not necessarily follow that the charterer is at fault. He must pay until redelivery, but not necessarily at the market rate in excess of the contract rate, on the basis that the excess is damages for breach of the charterparty. There may be many reasons for late redelivery for which the charterer is not responsible. Clauses in this charterparty impose obligations on the owners. The ship may be late in redelivery for want of proper provisions or stores; there may have been a suspension of hire due to causes for which the owners were responsible; there may have been delay due to the ship not being seaworthy. Where the late redelivery is one for which the charterers are responsible, the breach is not in the ordering of the voyage, provided that it is a voyage which could reasonably be expected to end within the contract period, but in the failure to redeliver.

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(1) (1889) 5 T. L. R. 577.

(2) (1913) 18 Com. Cas. 300.

In the case before me there is no finding by the umpire that the charterers have been guilty of a breach by not redelivering within the contract period. It was contended that in this charterparty time was of the essence of the contract, and, without deciding the point, I shall assume that it was and that the latest date for redelivery of the vessel was either October 17 or October 27. Even so, the finding of the umpire was that on September 4, the date when the voyage was ordered, it was reasonable to conclude that it would be completed by October 17, so that the ship could be, and would be, redelivered within the contract period, and I repeat that there was no finding that the unexpected delay was due to a breach by the charterers. Apart, therefore, from the provision in cl. 6 of the charterparty it seems clear that there was no liability for excess freight. Indeed the owners conceded that if their construction of cl. 6 were wrong, the charterparty rate would apply throughout until redelivery. In that event it was not contended that the higher market rate was payable as damages for non-delivery within the contract period. Counsel for the owners pointed out that the points of claim were based on cl. 6 of the charterparty and not on a breach of contract by failure to redeliver the vessel.

I approach the construction of cl. 6, therefore, bearing in mind that the ordering of a voyage by the charterers which could not reasonably be expected to be completed within the contract period would be a breach of contract, and that in such a case the charterers would not have a contractual right to the use of the steamer to enable them to complete the voyage and, that, on the other hand, the ordering of a voyage which could reasonably be expected to be completed within the contract period would not be a breach of contract. In my opinion it is plain that cl. 6 is dealing with what is ex necessitate a breach—namely, the ordering of a voyage which the charterers would have no right to order. The relevant words of the clause are: "Should steamer be ordered on a voyage "by which the charter period will be exceeded charterers to "have the use of the steamer to enable them to complete the "voyage, but for any time exceeding termination date "charterers to pay market rate, if higher than rate stipulated "herein." What is being dealt with is clearly the ordering of a voyage which "will" ex necessitate—it is immaterial whether or not the word "will" means "shall"—not which may, exceed the charter period. I have no doubt that the ordinary business man reading cl. 6 would give to it this meaning.

It has been contended that I should read the clause as if the words were: "should the steamer be ordered on a voyage "which, in fact, or which in the results, exceeds the charter "period." If that had been the intention of the parties, it would have been easy to say so in terms in the charterparty. I can see no grounds for reading this clause as if it contained words other than those which, in fact, it contains, and to my mind the words "will be" suggest what is inevitable at the time the voyage is ordered. So construed, the clause has a natural and reasonable meaning. It deals with such a voyage as by the terms of the charterparty should not have been ordered and which inevitably would lead to a failure to redeliver the vessel within the contract period. Moreover, the construction contended for by the owners would turn the clause into an agreement by the charterers to pay damages for failure to redeliver the vessel within the contract period in every case, although the voyage ordered was one which could reasonably be expected to be completed within the contract period and the delay was not one for which the charterers were to blame, and indeed was one for which the owners themselves were to blame. This clause must be reasonably construed, and a construction which imposes on the charterers the obligation to pay higher freight for a delay for which the owners themselves may be in part responsible, is not reasonable. It was also contended for the owners that I must ignore the word "but" in the clause and read the final sentence as if there was a full stop after the word "voyage,"

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HECTOR STEAMSHIP CO. *v.* V. O. SOVFRACHT, MOSCOW.

Atkinson J.

thus: "Should steamer be ordered on a voyage by which the "charter period will be exceeded, charterers to have the use "of the steamer to enable them to complete the voyage. For "any time exceeding termination date charterers to pay market "rate if higher than rate stipulated herein." I am asked to read the two sentences disjunctively, as if the latter were unrelated to the former sentence. Again, there is no ground for my doing this. I have to construe what is in the charterparty, not what the owners would prefer to be there. The last sentence is introduced by the word "but," relating it to what has gone before. Taking this view, it is unnecessary for me to consider on which of the two dates—October 17 or October 27—the period of the contract was terminated. My inclination, had I to decide the point, again would be to agree with the umpire that the date was October 27. The words in cl. 34: "charterers have the option of continuing this charter for "a further period of about one month" must indicate that the "continuing" of the charter does not begin until the charter period is completed. The claim of the owners has been that this is a fixed time charterparty due to the use of a vague word, "about," defined as that word is defined in the charterparty, so that this is a charterparty up to September 7 plus ten days, that is, to a fixed date, September 17. You can only continue the charter from that date and if the option is exercised of continuing the charter "for a further period of about one "month," that seems to me to add to the period of the charterparty one month plus ten days. I think that the award was right.

Award confirmed.

Solicitors for owners: *Ince, Roscoe, Wilson & Glover, for Allen Pratt & Geldard, Cardiff.*

Solicitors for charterers: *Lawrence Jones & Co.*

C. G. M.

C. A.

1945

Mar. 21.

Lawrence and Morton L.JJ., Uthwatt J.

POOLE CORPORATION *v.* MOODY.

Local government—Street—Private street works—Apportionment of expense—Charge on premises—Action to enforce—" Sum recoverable " by virtue of any enactment "—Claim for " equitable relief "—Limitation—Private Street Works Act, 1892 (55 *&* 56 *Vict., c.* 57), *s.* 13, *sub-s.* 1*—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-ss.* 1 (*d*), 7 ; *s.* 18, *sub-ss.* 1, 5.

On November 17, 1944, the plaintiffs, an urban sanitary authority, brought an action against the defendant, in which they asked for a declaration that they were entitled under s. 13, sub-s. 1, of the Private Street Works Act, 1892, to a charge on premises owned by him, in respect of expenses incurred by them for private street works which they had executed under s. 6 of the Act. They also claimed interest from the date of the final apportionment on the defendant. The work was completed on March 18, 1933, and the final apportionment was made on June 27, 1933. The defendant pleaded in his defence that the plaintiffs' claim was barred by the Limitation Act, 1939. It was contended on his behalf that the action was one to recover a sum of money recoverable by virtue of an enactment within the meaning of s. 2, sub-s. 1 (*d*), of the Act, and that by the terms of the sub-section such an action could not be brought after the expiration of six years from the date on which the cause of action accrued, namely, March 18, 1933 :—

Held, that assuming that the action was one to recover a sum of money by virtue of an enactment, it was none the less a claim for equitable relief within the meaning of the Limitation Act, 1939, s. 2, sub-s. 7, and that, consequently, the provisions of s. 2 in regard to the limitation of proceedings did not apply to it ; that the claim was one to recover a " principal sum of money secured " by a mortgage or other charge on property," within the meaning of s. 18, sub-s. 1, of the Act, and the period of limitation applicable was, therefore, twelve years from the date when the right to receive the money accrued, with the result that the plaintiffs' action was not barred.

Held, further, that by s. 18, sub-s. 5, of the Act the interest recoverable was limited to that which became due within six years from the date of the bringing of the action.

APPEAL from Poole county court.

On November 17, 1944, an action was brought by the plaintiffs, the corporation of Poole, as the urban sanitary authority, against the defendant, in which they claimed a declaration that they were entitled under s. 13 of the Private Street Works Act, 1892 (1), to a charge for 129*l.* 2*s.* 1*d.*, on premises in the borough owned by the defendant—such sum being the balance of a sum of 132*l.* 2*s.* 1*d.*, the apportioned expenses incurred by the plaintiffs in executing private street works under s. 6 of the Act—together with interest amounting to 72*l.* 8*s.* 0*d.* on 129*l.* 2*s.* 1*d.* at the rate of five per cent. per annum, from June 27, 1933, the date of the final apportionment on the defendant of the expenses in question. The plaintiffs also asked for an inquiry as to the existence of other encumbrances on the property, for an order for the sale of the premises for the purpose of enforcing the charge, and the application of the proceeds of the sale in payment thereof.

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(1) Private Street Works Act, 1892, s. 13, sub-s. 1 : " Any " premises included in the final " apportionment . . . . shall stand " and remain charged . . . . with " the sum finally apportioned on

The work in question was completed on March 18, 1933, and

"them . . . . with interest at the "rate of four pounds per centum "per annum, and the urban "authority shall, for the recovery "of such sum and interest, have "all the same powers and remedies "under the Conveyancing and "Law of Property Act, 1881, and "otherwise as if they were mort-"gagees having powers of sale "and lease and of appointing a "receiver."

Section 14: "The urban auth-"ority, if they think fit, may from "time to time (in addition and "without prejudice to any other "remedy) recover summarily in a "court of summary jurisdiction, "or as a simple contract debt by "action in any court of competent "jurisdiction, from the owner for "the time being of any premises in "respect of which any sum is due "for expenses of private street "works the whole or any portion of "such sum, together with interest "at a rate not exceeding four per "centum per annum, from the "date of the final apportionment "till payment thereof."

Limitation Act, 1939, s. 2, sub-s. 1: "The following actions "shall not be brought after the "expiration of six years from the "date on which the cause of action "accrued, that is to say . . . . "(*d*) actions to recover any sum "recoverable by virtue of any "enactment . . . ."

Sub-section 7: "This section "shall not apply to any claim for "specific performance of a con-"tract or for an injunction or for "other equitable relief . . . ."

Section 18, sub-s. 1: "No "action shall be brought to re-"cover any principal sum of "money secured by a mortgage or "other charge on property, "whether real or personal, or to "recover the proceeds of the sale "of land, after the expiration of "twelve years from the date when "the right to receive the money "accrued."

Sub-section 5: "No action to "recover arrears of interest pay-"able in respect of any sum of "money secured by a mortgage "or other charge or payable "in respect of proceeds of the "sale of land, or to recover "damages in respect of such "arrears shall be brought after the "expiration of six years from the "date on which the interest "became due."

Section 31: "'Action' in-"cludes any proceeding in a court "of law, including an ecclesias-"tical court."

on September 5, 1933, the plaintiff corporation made an order declaring that the expenses incurred in connexion with the defendant's house should be payable by ten annual instalments on July 1 in each year, with interest computed from June 27, 1933, at the rate of five per cent. per annum on the balance for the time being remaining due, until the whole of the sum should be paid, the first instalment, with interest, to be paid on July 1, 1934. None of the instalments was paid by the defendant and by his statement of defence he pleaded that the plaintiffs' claim was barred by the Limitation Act, 1939.

The county court judge held that the claim was not barred, basing his judgment on the fact that so long as the order for payment by instalments remained in force, the plaintiffs were not entitled to sue for the full amount claimed, but only for the amount of each instalment as it fell due. He accordingly made the declaration for which the plaintiffs asked, both in respect of the principal sum and also of the interest thereon, and directed an inquiry and sale. The defendant appealed.

O'Sullivan K.C. and *W. G. H. Cook* for defendant. The decision of the county court judge was wrong and the plaintiffs' right of action is barred by the Limitation Act, 1939. By s. 31 of that Act " action " is defined as including " any proceeding " in a court of law," which would clearly include an action to enforce a charge. By s. 2, sub-s. 1, " actions to recover any " sum recoverable by virtue of any enactment " cannot be brought after the expiration of six years from the date on which the cause of action accrued. The plaintiffs' action is to recover a sum which was made recoverable by the Private Street Works Act, 1892, and the cause of action accrued on March 18, 1933, when the work in respect of which the expenses were incurred was completed. As the action was not begun until November 17, 1944, it is not maintainable. The claim here is expressed to be under the Act of 1892, and the judgment of the county court judge proceeded on that basis. [They referred to *Dennerley* v. *Prestwich U. D. C.* (1) and *West Ham Corporation* v. *Sharp* (2).]

Squibb for plaintiffs. The county court judge was right in holding that the plaintiffs' claim is not barred. The action is not one to recover a sum of money. In such an action the plaintiff asks for a judgment that the defendant should pay him a specified sum of money. Here the claim is for a declaration

(1) [1930] 1 K. B. 334. (2) [1907] 1 K. B. 445.

that the plaintiffs are entitled to a charge. Assuming, however, that the action is one to which the Limitation Act, 1939, applies, does it fall within the provisions of s. 2 or s. 18? The plaintiffs are claiming a form of equitable relief within the meaning of sub-s. 7, of s. 2, and that being so, sub-s. 7 provides that s. 2 is not to apply. Therefore the limitation period of six years has no application to the present case and it is necessary to look elsewhere to find the relevant provision. Clearly the case falls within the terms of s. 18, sub-s. 1, since it is an action brought to recover a " principal sum of money secured " by a mortgage or other charge on property," and the limitation period is expressed to be twelve years from the date when the right to receive the money accrued. That period not having expired when the plaintiffs began their action, the right to bring it is not barred. [*Hornsey Local Board* v. *Monarch Investment Building Society* (1) referred to.]

O'Sullivan K.C. in reply. The plaintiffs' claim is not one for equitable relief within the meaning of s. 2, sub-s. 7, of the Limitation Act, 1939, but a claim for statutory relief under the Private Street Works Act, 1892, although it may be conceded that the statutory relief given by that Act is given by analogy with the old equitable remedies. To hold that all claims for equitable relief are outside the ambit of s. 2 would be to renew the separation between law and equity which previously existed. The application of sub-s. 7 of s. 2 should be limited to cases of equitable relief which are not specifically covered by any statute and in which, under the old practice, Chancery judges applied a rule of limitation, not in obedience to a statute, but by analogy.

LAWRENCE L.J. I will ask Morton L.J. to deliver judgment first.

MORTON L.J. stated the facts, read the material sections of the Private Street Works Act, 1892, and the Limitation Act, 1939, and continued: The Private Street Works Act, 1892, is an adoptive Act and it is common ground that it has been adopted by the Poole Corporation, and that they are an urban sanitary authority. The important sections of the Act for the purposes of the present case are ss. 13 and 14. Section 13, sub-s. 1, appears to me to fall into two parts. The first part, ending with the words " four pounds per centum per annum," charges

(1) (1889) 24 Q. B. D. 1.

on the premises the sums payable under the final apportionment, while the latter part confers certain powers and remedies on the urban authority. In my view, however, the conferring of these powers and remedies in no way detracts from the rights which have already been conferred on the urban authority by virtue of the charge created by the first part of the subsection. Section 14 provides that the urban authority may in addition, and without prejudice to any other remedy, recover the amount due in a court of summary jurisdiction or by action as a simple contract debt. That provision gives a particular power to the urban authority to recover the sum so due summarily, or by a particular form of action but, again, does not in any way detract from the powers already conferred by s. 13, sub-s. 1.

I should mention that in my opinion the order under which the defendant was to pay the expenses chargeable on his premises by ten annual instalments does not affect the decision of this court, although the county court judge based his judgment in favour of the plaintiffs largely, if not entirely, on the existence of that order. In any event it is clear that the whole of the instalments had become payable before the action was brought. The only point which has been argued on this appeal is whether the plaintiffs' claim is barred by the Limitation Act, 1939. The contention on behalf of the defendant can be stated quite briefly. Mr. O'Sullivan pointed to the wide definition of " action " in s. 31 of the Act, where it is stated to include " any proceeding in a court of law, including an ecclesi-" astical court," and contended that the present action, within the meaning of s. 2, sub-s. 1 (*d*), was an action to recover a sum recoverable by virtue of an enactment, namely, the Private Street Works Act, 1892, and therefore the action is statute barred because the period of six years, after which such an action cannot be brought, has been exceeded. I am prepared to assume in favour of the defendant that the action is " an " action to recover a sum recoverable by virtue of any enact-" ment," but to my mind it is quite immaterial whether that is so or not because I am clearly of opinion that sub-s. 7 of s. 2 of the Act applies to the present case. That sub-section provides that s. 2 " shall not apply to any claim for specific " performance of a contract or for an injunction or for other " equitable relief . . . . " To my mind the present action, though not one for specific performance or an injunction, is quite plainly a claim for " other equitable relief." It is a claim by a chargee of land asking the court to apply the very ordinary equitable remedy of having the land sold and the proceeds applied in payment of the sum charged on the land. That is a thing that is done over and over again by the court in the exercise of its equitable jurisdiction, and an example of it is to be found in *West Ham Corporation* v. *Sharp* (1). It is a perfectly ordinary jurisdiction in a case in which there is a charge on land to secure a particular sum, and is essentially equitable relief. Indeed, if it is not, I have difficulty in seeing how it could be described. That being so, s. 2 of the Limitation Act, 1939, is entirely out of the case. The defendant cannot rely on it, and one must look elsewhere to see what is the period of limitation applicable in the case of this particular action. In my view it is plainly the period laid down in s. 18 as applicable to an action to recover any principal sum of "money secured by a mortgage or other charge on property"; that is to say, twelve years from the date when the right to receive the money accrued. The result is that the present proceedings are not out of time, and, so far as the principal sum claimed is concerned, the plaintiffs are entitled to succeed.

As regards the interest claimed, the question does not appear to have been argued before the county court judge whether the plaintiffs are entitled to recover the whole of the arrears, or only the interest which became due within six years from the date when the proceedings were begun. The order of the judge extended to the whole of the interest claimed by the plaintiffs, namely, 72*l.* 8*s.* 0*d.*, but I can see no ground on which the plaintiffs can escape from the provisions of s. 18, sub-s. 5, of the Act. It seems to me that this is an "action to recover "arrears of interest payable in respect of any sum of money "secured by a mortgage or other charge," and that, consequently, no action can be brought after the expiration of six years from the date on which the interest became due. Again, I do not think that the position is in any way affected by the order for payment by instalments, and the result is that the order of the county court judge must be varied in the respect which I have indicated, so that the interest recoverable will be limited in accordance with the provisions of s. 18, sub-s. 5, of the Act. To that extent this appeal succeeds, but as regards the rest of the claim, I think the decision of the county court judge is correct.

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(1) [1907] 1 K. B. 445.

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POOLE CORPORATION *v.* MOODY.

LAWRENCE L.J. I agree and have nothing to add.

UTHWATT J. I agree and have nothing to add.

Solicitors for plaintiffs: *Sharpe, Pritchard & Co., for W. Kenyon, Poole.*

Solicitors for defendant: *Barnes & Butler, for J. W. Miller & Sons, Poole.*

P. B. D.

C. A.

1945

Feb. 20; *Mar.* 5.

Lord Goddard and du Parcq L.J.

CINEMA PRESS, LIMITED *v.* PICTURES & PLEASURES, LIMITED.

Costs—Taxation of costs—Order giving plaintiffs costs of action save that costs of issue of damages were to be the defendants from date of payment into court—Mode of taxation—Division of items common to issue of damages and other issues.

When in an action an order is made that the plaintiff shall have the costs of the action, except that the costs of the issue of damages as from the date of payment into court with a denial of liability shall be the defendants, the costs of the issue of damages are confined to increased costs, but the taxing master must, in taxing the costs, divide the costs in respect of any items incurred after the date of payment in and attributable both to the issue of damages and to any other issues in the action, and give to the defendants so much of these costs as is attributable to the issue of damages.

The rule laid down in *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* [1929] A. C. 88, applied.

These complicated taxations can be avoided by judges awarding the costs between the parties in the proportion thought fair.

APPEAL from Lynskey J.

In an action brought by the plaintiffs, Cinema Press, Ld., for libel against the defendants, Pictures & Pleasures, Ld., the defendants by their defence, dated July 2, 1943, denied that the words complained of were published "of or concerning "the plaintiffs or of them in the way of their business," or that the words were capable of any defamatory meaning. Three days later the defendants paid 25*l.* into court with a denial of liability. The plaintiffs did not take the money and the action went to trial. Lewis J. found in the plaintiffs' favour on the issue of liability and awarded 5*l.* damages; and he gave the plaintiffs the costs, subject to the defendants being entitled to the costs of the issue of damages after the date of payment in. The formal judgment as drawn up provided that "the plaintiffs recover from the defendants 5*l.* and costs to "be taxed, save that the costs on the issue of damages after "date of payment of the sum of 25*l.* into court be the "defendants."

The taxing master came to the conclusion that the defendants were entitled to nothing under the order. The defendants then carried in objections in which they pointed out that some portion of the items under the headings of discovery, correspondence, instructions to counsel to advise on evidence, instructions for brief, brief fees and transcript of the judgment, must be attributed to the issue of damages. The master, answering the objections, observed as follows: "The costs of an issue are confined to increased costs: "*Holloway & Webb, Ld.* v. *Crompton* (1)," and added that, after hearing the parties and carefully perusing the papers in the action, he could not find that the costs of either of the parties had been increased by reason of the issue of damages. He therefore overruled the objections.

On appeal, Lynskey J. dismissed the appeal. The defendants appealed.

Gilbert Dare for the defendants. The taxing master in assessing the costs of the issue of damages at nothing has failed to recognize that while the general costs are not apportioned, items applicable to this issue as well as the main issues are divided. The issues on the pleading were, (1.) whether the statement complained of was defamatory, (2.) whether it referred to the plaintiff, and (3.) the amount of damages. Damages were a very vital issue. The master was influenced by *Holloway & Webb, Ld.* v. *Crompton* (1), but in *Medway Oil & Storage Co.* v. *Continental Contractors, Ld.* (2) it was held that although when both a claim and counterclaim succeed the costs are not apportioned there should be a division of items common to both claim and counterclaim. That case applies equally in regard to different issues: see *Christie* v. *Platt* (3).

Valentine Holmes for the plaintiffs. Two questions arise in the case: (1.) what is the principle to be applied by the taxing master in regard to an order in the form made here, and (2.) if he was right as to the principle to be applied,

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(1) [1916] 2 Ch. 436.
(2) [1929] A. C. 88.
(3) [1921] 2 K. B. 17, 21.

C. A.

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CINEMA PRESS, LD. *v.* PICTURES & PLEASURES, LD.

did he apply it correctly. There is no longer any doubt as to the principle to be applied. The successful plaintiff receives the general costs of the action and the defendant only the increased costs incurred on the issue on which the defendant was successful. If the order here was to have the effect for which the defendants contend it should have been made in the form adopted in *Wilcox* v. *Kettell* (1). The costs in regard to the issue of damages must in any case have been very small. There is no ground for dividing items of costs as is done in the case of a claim and counterclaim as directed in the *Medway Oil & Storage* case (2). In *Holloway & Webb, Ld.* v. *Crompton* (3) Sargant J. recognized that by reason of the addition to Or. 65, r. 2, made in 1902, the practice hitherto adopted in the Chancery Division was to be abandoned for that which had prevailed at common law for many years and is that applied here: see also *Adamson* v. *Birkenhead Corporation* (4) where the same rule was held to apply after Or. 65, r. 2, had ceased to exist. That shows the principle to be applied and it is contended that the taxing master applied it properly.

[He also referred to *Sparrow* v. *Hill* (5) and *Fox* v. *Central Silkstone Collieries, Ld.* (6).]

Gilbert Dare replied.

Cur. adv. vult.

Mar. 5. The judgment of the court was read by LORD GODDARD. The appellants failed in an application to Lynskey J., for a review of the taxation of costs in an action in which they were defendants, and have appealed to this court against the learned judge's refusal to make the order. *Holloway & Webb, Ld.* v. *Crompton* (3), on which case the master founds his ruling, was decided by Sargant J. in 1916. We think that Mr. Holmes is right when he says that the order as to costs in that case and the order in the present case are in substantially the same form; that is to say, there is, for our present purpose, no distinction to be drawn between the two orders. Sargant J. based his decision, as he was bound to do, on Or. 65, r. 2, of the Rules of the Supreme Court, 1883, as amended in 1902 by the addition of

(1) [1937] 1 All E. R. 222.
(2) [1929] A. C. 88.
(3) [1916] 2 Ch. 436.
(4) [1937] Ch. 279.
(5) (1881) 8 Q. B. D. 479.
(6) [1912] 2 K. B. 597.

a paragraph after the general direction, that costs of issues should follow the event, which had previously constituted the whole of the rule. The paragraph which was added in 1902 was as follows: " And an order giving a party costs except " so far as they have been occasioned or incurred by or relate " to some particular issue or part of his proceedings shall be " read and construed as excluding only the amount by which " the costs have been increased by such issue or proceedings, " but the court or judge, if the whole costs of the action are " not intended to be given to the party, may, wherever " practicable, by the order direct taxation of the whole costs " and payment of such proportion thereof as the court or " judge shall determine." This addition, as Sargant J. pointed out, reversed what had been the practice of the Chancery Division, by which " if a party was not ordered " to pay or was given the costs of a particular issue he was " relieved of or given, as the case might be, not only the costs " of that particular issue, but also an apportioned part of the " general costs of the action."(1) Owing and solely owing to the alteration in the rule, Sargant J. held himself to be " bound . . . . to read and construe this part of the order " as excluding from the costs of the action to be taxed in " favour of the plaintiffs that amount only by which the " costs have been increased by the particular claims in " question." He added that, " this being so, the correlative " part of the order as to the costs to be taxed in favour of the " defendant must necessarily be read as relating in its turn " only to the increased costs occasioned by the same claims." (2)

It is convenient to refer next to *Adamson* v. *Birkenhead Corporation* (3), decided by Bennett J., twenty years after the decision of Sargant J. There the order made as to costs was that the defendants should recover their costs of defence, excepting such costs as were attributable to one issue, which was specified in the order. No doubt had ever been thrown on the correctness of the decision of Sargant J., but an event had occurred which necessarily shook its authority, for by the rules of the Supreme Court, 1929, Or. 65, r. 2, had been revoked. On what then could the decision of Sargant J. be said to rest? Bennett J. solved this formidable problem by having recourse to the history of what, if his view is right, may be said to have been one of the decisive battles of the law. (4) We will summarize the passage in his judgment to which we are now referring in our own words, as follows. Until 1902 the Chancery Taxing Office had proceeded on the principle which, as Sargant J. held, the amendment of Or. 65, r. 2, in that year had abrogated. The practice of the masters who taxed costs of actions in the King's Bench Division had long been to follow the rule to which the 1902 amendment gave statutory force. True it was that Or. 65, r. 2, had disappeared, taking the amendment with it, but, none the less, what may be called the common law of taxation was left in possession of the field, by reason of Or. 65, r. 1B, an addition made to the rules of the Supreme Court in 1903, which had the effect of amalgamating the Chancery Taxing Office with the Central Office of the Supreme Court. The practical effect of this amalgamation seems to have been that the rule which the Chancery taxing officers had observed and kept alive till 1902 had no life left in it when, in 1929, its destroyer was itself destroyed. We will here quote the words of Bennett J. (1): " The effect of these changes in the rules seems to me to have " been to establish one taxing office, the masters of which " taxed bills of costs of actions tried in the Chancery Division " and the King's Bench Division, and to abolish the Chancery " Taxing Office, and in taxing costs under such a judgment " as the present to establish the principles of taxation thereto- " fore applied in such cases by the common law masters."

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(1) [1916] 2 Ch. 441.
(2) Ibid. 442.
(3) [1937] Ch. 279.
(4) Ibid. 285–287.

But this affords no explanation for the revocation of the rule. In our opinion, the reason why it was revoked, in all probability, was because after the decision of the House of Lords, in *Medway Oil and Storage Co.* v. *Continental Contractors, Ld.* (2), it was regarded as unnecessary. That decision was given on October 30, 1928, and the rule was revoked by the Rules of the Supreme Court (No. 3) Order in the following year. *The Medway Oil & Storage* case (2) related to the taxation of the costs of a claim and counterclaim, but in our opinion there is no difference in principle between a taxation in such a case and one in which the costs of an issue are ordered to be borne by the party to whom the general costs of the action are given. There may be cases in which the claim and counterclaim raise substantially the same issue, as in *Wilson* v. *Walters* (3), where each party accused the other of negligent driving and the issue, therefore, was which of the

(1) [1937] Ch. 286.
(2) [1929] A. C. 88.
(3) [1926] 1 K. B. 511.

two was to blame. In the *Medway Oil & Storage* case (1) the issue raised by claim and counterclaim were different, and we can see no difference for this purpose between a case where the plaintiff succeeds on his claim and loses on the counterclaim and one in which he succeeds on one issue on his claim and is defeated on another.

Therefore it seems to us that the true rule of taxation in these cases is to be found in the *Medway Oil & Storage* case (1), which no doubt gives effect to the principles formerly applied by the common law masters. That case decides that, in the absence of special directions such as were given by Clauson J. in *Willcox* v. *Kettell* (2), where both claim and counterclaim succeed or are dismissed with costs, there is to be no apportionment and it follows from what we have already said that this applies equally to a case where one party is given the costs of the action, except those relating to an issue or issues, or where he is not only deprived of those costs but they are given to the other party. But this is not an end of the matter. While the House held that there was to be no apportionment, they held that there could and ought to be a division of some items which were common to both claim and counterclaim. " The " distinction," said Lord Haldane, " between division and " apportionment may in certain circumstances be a thin one," but he went on to say that it was fundamental. The distinction will be found stated in Seton, 7th ed., vol. 1, p. 250, and is in these terms. " When the court gives 'part of' the costs " of the action, it may do so in two ways ; the one will involve " an apportionment of the whole of the general charges, the " other will extend only to the excess of expense incurred in " consequence of the particular matter directed to be " excepted." Then it is said that, according to the settled practice of the Chancery Division, the former direction carries a portion of the costs of every general proceeding in the action. It is this that the *Medway Oil & Storage* case (1) prohibits being done in the future, but Lord Haldane points out that there may be items which on their face are single but are in reality double, that is, in part relate to the claim and in part to the counterclaim ; and, we may add, in part to one issue and in part to another. In such cases, he says, there must be a division.

The most frequent instance would no doubt be the fee on the brief and the charges for instructions for brief, and the

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(1) [1929] A. C. 88.

(2) [1937] 1 All E. R. 222.

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division referred to by Lord Haldane can easily be understood by an illustration. Suppose an accident case, in which both liability and damage were an issue and in which the defendant made a payment into court with denial of liability. To establish liability it may be that the plaintiff has to call a large number of witnesses, including expensive experts. To prove his damage he may only have to call one doctor. The defendant also brings an array of witnesses on liability. In the result the plaintiff establishes liability, but fails to recover as much as was paid into court. If the judge gives the defendant the general costs, but gives the plaintiff the costs of the issue on which he succeeded, it would clearly be wrong if no division of the brief fee were made. The fee has been marked for counsel to argue and contest both issues, and in the case supposed most of the time and labour will have been spent on liability. It seems to us that in such a case the taxing master must consider what would have been a fair fee to fix had the only issue been liability. Or it may be that on the issue of damage several doctors and surgeons were called on either side. Here, again, the fee ought to be divided and it might well be that in a particular case the right view would be that more was attributable to the medical aspect than to that of liability, and so a smaller proportion of the fee only ought to be allowed.

A very similar state of affairs arose in *Christie* v. *Platt* (1). The House of Lords did not criticize the result reached in that case, which involved the division of certain items, though they considered that the Court of Appeal had in some degree failed to recognize the distinction between apportionment and division. But equally there will be cases (and this may be one) where in fact no division is called for. Where, as often happens in defamation cases, no particular evidence is given as to damage, and no particular difficulty arises as to assessment, the taxing master may well consider that no part of the brief fee could fairly be attributable to that matter. The fee might well and probably would be the same if counsel were instructed to state that he was not asking for more than nominal damages. The same is true in many other cases. In a case of breach of contract, say, for failure to accept goods, there may be little or no question as to the measure of damage once liability is established. On the other hand, there are often cases where by far the most difficult and lengthy part of the

(1) [1921] 2 K. B. 17.

case is as to the true measure or as to the proof of the damage that the plaintiff has suffered.

So while the answer of the master in the present case, "that there is no apportionment of costs in issue cases," is correct as far as it goes, this does not deal with the question whether there are not some items which must be divided, nor would it appear that he has applied his mind to that question. It may well be that the result in this case will be trifling, for, as I have already said, it is possible that there will be no division of brief fee and instructions for brief, but this case is of some general importance as calling attention to the fact that it is the *Medway Oil & Storage* case (1) that is now the governing authority, and taxing officers must in these cases consider the question of the division of certain items common to both issues in the light of that decision, as distinct from apportionment in accordance with the former, but now rejected, practice of the Chancery Taxing Office. The court has not read the briefs or instructions and nothing that we have said is to be taken as meaning that in this case there can be no division. Whether there should be the master will consider in the light of this judgment. It also seems that some other items to which our attention has been called, such as discovery and correspondence, may also have to be reconsidered, and accordingly the bill must be referred back to the master for reconsideration.

This case is another illustration of the difficulty that often arises where special orders as to costs are made involving taxation of those relating to particular issues. Considering that the learned judge only awarded 5*l.* where 25*l.* had been paid into court, it is at least likely that in making the order that he did, he intended the defendant to get some real benefit from it, in consequence of his having made the payment into court. In the view that the master took, he got nothing and, as a consequence of this review, it may still be that he will get very little. These difficult and complicated taxations can be avoided by awarding to one side or the other what proportion of the costs the judge thinks fair. There is no doubt as to his jurisdiction to do so and anything which works in favour of simplicity in these matters is desirable. It is too much to expect that judges and counsel, to whom questions of taxation are unfamiliar, will always be conversant with the many and by no means easy cases on the subject, nor can

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(1) [1929] A. C. 88.

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solicitors instruct counsel in advance on a matter such as this, as they cannot know how the judge will exercise his discretion or in favour of which party it will be exercised.

We may be allowed to conclude this judgment by quoting the closing passage of Lord Blanesburgh's speech in the *Medway Oil & Storage* case (1): "This appeal will not be "without permanent utility if it brings home to learned "judges the necessity, in cases like these, of adjusting "critically their orders as to costs if these orders are not "sometimes to produce results at once unintentional and "unjust," and we would add that the simplest way is to award costs in such proportions as the judge thinks fair. The order of the court will be that the appeal is allowed. The bill must be remitted to the taxing master for him to tax again in the light of this judgment and when this has been done the appeal will be restored to the list and the court will then deal with the question of costs.

Appeal allowed.

Solicitors: *H. S. Wright & Webb; King Hamilton & Co.*

H. C. G.

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(1) [1929] A. C. 112.

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Mar. 23.

Lord Goddard. MacKinnon and du Parcq L.JJ.

D. & L. CATERERS, LIMITED, AND JACKSON *v.* D'AJOU.

Defamation—Slander actionable per se—Limited liability company—Words calculated to injure reputation in relation to trade or business—Imputation of crime punishable corporally.

A limited liability company, no less than an individual, can maintain an action for slander without proof of special damage, where the words are calculated to injure its reputation in relation to its trade or business.

Decision of Stable J. (ante p. 210) affirmed on this point.

The question (also decided by Stable J. in the plaintiff's favour) whether a limited liability company can sue without proof of special damage for a slander imputing a crime punishable corporally, expressly reserved for future decision.

APPEAL from Stable J.

The plaintiff company, of which the plaintiff Jackson was the managing director, carried on the business of a restaurant. The plaintiffs alleged that the defendant had slandered the

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plaintiffs to one, Levene, by telling him, as Stable J. found, that the plaintiffs were illegally carrying on their restaurant in breach of the relevant orders of the Ministry of Food, and were thereby committing criminal offences, which in the case of an individual could be punished corporally by imprisonment. The defendant did not justify, but contended that a company, which could not be punished corporally, could not maintain an action for slander imputing a criminal offence, without proof of special damage; nor could it do so for a slander calculated to injure its reputation in its business. Stable J. found in favour of the plaintiffs on both points and awarded each of them 50*l.* damages. The defendant appealed.

T. F. Davis for the defendant. There is no case in the books where a company has recovered damages for slander without proof of special damage. In *South Hetton Coal Co., Ld.* v. *North-Eastern News Association, Ld.* (1), careful distinction seems to have been drawn between slander on an individual and libel. The exception to the general rule as to special damage which permits an individual to sue if he is slandered in respect of his trade, profession, or business, is arbitrary, and should not be extended: *Jones* v. *Jones* (2). A company, not being punishable corporally, cannot, without proof of special damage, maintain an action for spoken words imputing a criminal offence.

Macaskie K.C. and *Fortune* for the plaintiffs were not called on.

Lord Goddard. In my opinion it is impossible to ask this court to say either that the words which Stable J. found were used were not capable of a defamatory meaning, or that they were not defamatory. Of course they were defamatory; they were meant to be defamatory. They say, as I read them, that the company and the plaintiff Jackson are carrying on this restaurant in a questionable manner, calling for the specific attention of the Ministry of Food. It is obviously implied that the rationing orders made under the Defence of the Realm Regulations have been broken, and I think it is also indicated that the plaintiff Jackson is buying food in the "black market," as it is commonly called. I do not think that anybody with a modicum of common sense could have any doubt that that is so. Therefore those words are

(1) [1894] 1 Q. B. 133.

(2) [1916] 2 A. C. 481, 489.

clearly and obviously defamatory and actionable with regard to the plaintiff Jackson.

So, too, I think, they are defamatory and actionable with regard to the plaintiff company, although, curiously enough, this precise point does not seem ever to have been decided. But in *South Hetton Coal Co., Ld.* v. *North-Eastern News Association, Ld.* (1) it was argued that a limited company could not bring an action for defamation—it is true that in that case it was written defamation. The court held that a company or corporation could sue for defamation—not, indeed for all defamation, but for defamation which related to its business. If one said of a company " It is a murderer " or " it is a forger," I have no doubt that the company could not bring an action, because a company cannot forge and a company cannot murder, so that in the ordinary way it would not be actionable to write something of a company which might be actionable in the case of individuals, unless what is written reflects on the company in the way of its business.

As a general proposition oral defamation is not actionable without proof of special damage. But there are certain cases in which the law implies damage, and one of these is oral defamation uttered in respect of a man's business. Therefore I can see no reason why, if a company is orally defamed in respect of its business, it should not have an action just as much as a private individual. Undoubtedly it could have an action for any defamation relating to its business if it could prove damage, and I see no principle on which any special distinction can be drawn in the case of a company between written and oral defamation. Therefore it seems to me that this action lies at the suit of the company.

I do not think, therefore, that it is necessary to discuss the question whether or not the company could maintain an action on the ground that it has been charged with a criminal offence : the plaintiff Jackson obviously could, if the words bear that meaning, as I think they do. These two matters seem to me as clear as daylight, and I think therefore, that the judgment so far was perfectly right.

[After dealing with another point which does not call for a report his Lordship concluded] :

I think that there is no fault to find with the judgment, and that the appeal must be dismissed with costs.

(1) [1894] 1 Q. B. 133.

MACKINNON L.J. I agree, and I do not think it necessary to add anything.

DU PARCQ L.J. I agree. It is not necessary to decide whether the judge was right in the view that "a limited "company"—I am reading his words—"without proof of "actual damage can sue for a defamatory spoken word im-"puting the commission of a criminal offence for which, if "it were a natural person, it could be sentenced to a term of "imprisonment." I wish to say nothing one way or the other about that but to reserve my opinion on it. I have no doubt, however, that a slander of a company in the way of its business is actionable without proof of special damage, I think that that follows logically from the earlier decisions. The question whether a corporation could bring an action for libel in any circumstances was dealt with as early as 1859, and it was then held, in *The Metropolitan Saloon Omnibus Co.* v. *Hawkins* (1), that it could maintain an action for libel by which its property was injured. At that time, in that case, it was not necessary to decide whether or not proof of special damage was necessary because special damage was there alleged. Then, as we have seen, later it was established—one instance is the *South Hetton Coal Company* case (2)—that in the case of a libel it is not necessary for the company to prove special damage. A company cannot sue either for libel or for slander unless it is defamed in the way of its business. In the case of a libel it is not necessary to prove special damage, and there can be no reason in principle why in the case of a slander it should be necessary to prove special damage. It is quite true that the judges in the *South Hetton Coal Company* case (2) do not specifically say that the rule is the same for slander as for libel. It was unnecessary to decide the point as they were dealing with an action for libel. It appears to me that for this particular purpose libel and slander in the case of a company are indistinguishable. I entirely agree with all that my Lord has said on the other points.

Appeal dismissed.

Solicitor for defendant: *E. C. Randall.*
Solicitors for plaintiffs: *B. A. Woolf & Co.*

(1) (1859) 4 H. & N. 87. (2) [1894] 1 Q. B. 133.

J. W. H.

In re A SOLICITOR.

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Feb. 12, 13, 14, 15, 16; *Mar.* 2.

Scott, Lawrence and Morton L.JJ.

Solicitor—Suspension—Instructions from lay organization as to member's claim for personal injury—Omission of solicitor to make reasonable inquiry—Solicitors' Practice Rules, 1936 (*St. R. & O.*, 1936, *No.* 1005/*L.* 24), *r.* 4 (*c*).

The obligation imposed on solicitors by r. 4 (*c*), of the Solicitors' Practice Rules, 1936, of making reasonable inquiry before accepting instructions in respect of claims arising as the result of death or personal injury from any organization whose business it is to support or present such claims, is an absolute obligation and does not depend on what the result of such inquiry would be, unless the known facts obviously preclude the necessity for such inquiry.

Proceedings before the disciplinary committee of the Law Society in respect of an alleged breach of such rules are not governed by the rules of the criminal law, whether or not such proceedings can properly be described as quasi-criminal.

Attitude of the Court of Appeal, before which the proceedings are a re-hearing, towards the findings of the committee, discussed.

Appeal from Divisional Court.

Six charges of professional misconduct were made against a solicitor before the disciplinary committee of the Law Society. The first five charges were for breaches of the Solicitors' Practice Rules, 1936 (1). Four of these were dismissed. The fifth was for a breach of r. 4 (*c*), which was limited in its purview to contentious business relating to " claims arising as a result of " death or personal injury including claims under the Workmen's Compensation Acts." The sixth charge, not expressed to be in breach of any statutory rule, was of accepting instructions from third parties to act for various named clients without making adequate inquiries. The fifth and sixth charges were held to be substantiated.

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(1) Solicitors' Practice Rules, 1936 (St. R. & O. 1936, No. 1005/L. 24), r. 4 (*a*): "A "solicitor shall not join or act in "association with any organization or person (not being a practising solicitor) whose business "or any part of whose business is "to make, support or prosecute "(whether by action or otherwise "and whether by a solicitor or "agent or otherwise) claims "arising as a result of death or "personal injury including claims "under the Workmen's Compensation Acts, 1925 to 1934, or "any statutory modification or "re-enactment thereof in such "circumstances that such person "or organization solicits or re"ceives any payment, gift or "benefit in respect of such claims "nor shall a solicitor act in respect "of any such claim for any client "introduced to him by such per"son or organization."

"(*b*) A solicitor shall not with "regard to any such claim know"ingly act for any client intro"duced or referred to him by any "person or organization whose "connexion with such client "arises from solicitation in respect "of the cause of any such claim.

"(*c*) It shall be the duty of "a solicitor to make reasonable "inquiry before accepting in"structions in respect of any such "claim for the purpose of ascer"taining whether the acceptance "of such instructions will involve "a contravention of the pro"visions of sub-s. (*a*) or (*b*) of this "rule."

The solicitor in nine separate cases had received instructions from one Ernest Clothier, a member of a body called the Ex-Regulars Association (an organization within the purview of r. 4 (*a*)) to act for a named person in each case who had sustained injuries in an accident. He had been warned by the respondents on previous occasions as to alleged breaches of r. 4.

On appeal the Divisional Court held that the solicitor had failed to make reasonable inquiry, and he was suspended from practice for two years and directed to pay the costs of the proceedings; but the operation of the order was suspended pending an appeal. The solicitor appealed.

Paull K.C. and *Astell Burt* for the appellant. Before a solicitor can be convicted under r. 4 (*a*) it must be proved, firstly, that he did not make reasonable inquiry, and, secondly, that if he had he would have realized that he would, if he acted, be violating sub-ss. (*a*) or (*b*). No evidence to that effect was given. Proceedings before the disciplinary committee are criminal or at least quasi-criminal, and the rules applicable to such proceedings should have been observed. But in several respects they were violated, notably where allegations of previous charges were made—see *Ex parte Pitt* (1), *In re Hardwick* (2), *In re a Solicitor* (3), *In re a Solicitor* (4) and *In re the Solicitors Act*, 1932 (5). [*In re a Solicitor* (*No.* 2) (6), *Rich* v. *Cook* (7) and Annual Practice, 1941, p. 2066, note " Speculative actions," were also referred to.] There was no evidence that payment was made to the Ex-Regulars Association, proof of which is necessary under r. 4 (*a*). The sixth charge is bad for duplicity. The penalty was too severe; a fine and censure would have been sufficient.

Havers K.C. and *Harold Brown* for the respondents. It is not true to say that it must be established that inquiry would have revealed that the action of the solicitor would violate the rules. The obligation to make reasonable inquiry is absolute. In fact inquiry would have resulted in showing there had been solicitation within the meaning of the rules, which it is submitted would be established by showing that the Ex-Regulars Association had said to the client : "Let us undertake your case." It is not necessary to show a gain to the association in order that the rules should apply. The sentence was not too severe. There is much of this solicitation in connexion with accident cases, and a deterrent sentence was necessary.

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(1) (1833) 2 Dowl. 439.
(2) (1883) 12 Q. B. D. 148.
(3) [1903] 1 K. B. 857.
(4) [1934] 2 K. B. 463.
(5) [1938] 1 K. B. 616.
(6) (1924) 40 T. L. R. 685.
(7) (1900) 110 L. T. Jo. 94.

Paull K.C. replied.

Cur adv. vult.

Mar. 2, 1945. The judgment of the court was read by SCOTT L.J., who, after stating the facts, continued : It is convenient to deal first with the questions which arise as to the construction of r. 4 of the Solicitors' Practice Rules, 1936, and, in particular, as to the construction of r. 4 (*c*). How far these rules were a codification of unwritten rules of the profession previously obtaining, or how far they enlarged or altered the unwritten law, is immaterial in our consideration of the disciplinary committee's finding that the solicitor was guilty of a breach of the written terms of r. 4 (*c*). The essential characteristic of the rules is that they are mandatory ; r. 4 (*c*) imposes a positive duty. Mr. Paull, for the solicitor, contends that no breach is proved of "the duty . . . . to make reasonable inquiry before accepting instructions," unless it is proved (1.) that the solicitor failed to make reasonable inquiry, and (2.) that if he had made reasonable inquiry he would have ascertained that the acceptance of the offered instructions would involve a breach of r. 4 (*a*) or r. 4 (*b*). We do not agree. It seems to us that sub-r. (*c*) imposes a duty to make reasonable inquiry before accepting instructions in respect of a particular type of claim, and that failure to make such inquiry involves a breach of the sub-rule, whatever might have been the result if reasonable inquiry had been made. All three parts of r. 4 are carefully limited in their purview to contentious business of a particular description, namely, to "claims arising as a "result of death or personal injury, including claims under the "Workmen's Compensation Acts, 1925 to 1934," see r. 4 (*a*). We will call them compendiously "accident claims" and substitute that phrase in our reading of the rule. Omitting immaterial words, and inserting two or three implications and explanatory expressions, and punctuating the language, the rule will then read thus :—

" (*a*) A solicitor shall not act (either (i.)) in association " with any organization or person, not being a practising solicitor, whose business is to make, support or prosecute accident " claims in such circumstances that such organization or " person solicits or receives any payment, gift or benefit in " respect of such claims (or (ii.)) in respect of any accident " claim for any client introduced to him by such person or " organization."

" Sub-section (*b*). A solicitor shall not with regard to any " accident claim knowingly act for any client introduced " to him by any person or organization whose connexion with " such client arises from solicitation in respect of the (accident) " which gave rise to the (claim)."

" Sub-section (*c*). It shall be the duty of the solicitor to " make reasonable inquiry before accepting instructions (sc. " from anybody) in respect of any accident claim, for the " purpose of ascertaining whether, if he accepts, he will " (contravene (*a*) or (*b*))."

The plain meaning of r. 4 (*c*) appears to us to be that every solicitor is imperatively required, before he accepts instructions from anybody in respect of an accident claim, to make all reasonable inquiry, in order to satisfy himself that he will not thereby find himself guilty of a contravention of (*a*) or (*b*). The word " reasonable " has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know. This very proper limitation upon the duty to inquire excludes from the ambit of the rule the many cases where the known facts obviously preclude the necessity of any such inquiry, but it leaves under the duty of inquiry the solicitor who does not know enough to make him substantially certain that there is no risk of mistake. Unless he has reasonable certainty of such knowledge, he comes under the positive obligation of the subparagraph. Still more does he come under that obligation in a case where he already has in fact reason to suspect the person or organization introducing the client of wittingly or unwittingly putting him in danger of himself contravening (*a*) or (*b*). A fortiori is this so if he has already had a past warning from the Law Society, the official guardians of the profession's conscience, that his relations with such other persons or organizations are dangerously near to, or even over, the border line of professional propriety. If the sub-section plainly means this, or even if it is impliedly based on such a view of the professional danger, it seems to follow necessarily that a breach can be established without any proof either (i.) that the acceptance of instructions would in fact involve a breach of sub-ss. (*a*) or (*b*), or (ii.) that the solicitor (who ex hypothesi has failed to make reasonable inquiry) actually expected that the acceptance of instructions would, or probably might, result in a breach of sub-ss. (*a*) or (*b*).

The evil aimed at by r. 4 (*a*) is the association of the solicitor with anybody, whether individual or an organization, who for reasons of business (as distinct from, for example, charity) is interested in accident claims, but is not a solicitor. It does not matter for the purpose of the prohibition whether such a person or organization actually obtains such business advantage or merely " solicits " it ; and that word there means " asks for " or " seeks." The evil aimed at by r. 4 (*b*) is different. " Touting " for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour of the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained. The client may seek him, but he must not seek the client. This rule of conduct must be made a reality, and not evaded by the subterfuge of getting some layman to do the touting for him. To ensure the success of this fundamental policy of the profession, in the case of accident claims, where, in practice, the danger is greatest, a veto is imposed in r. 4 (*b*) against accepting clients who have been brought to him by lay touts.

The construction which we have placed on r. 4 (*c*), and the admission to which we must now refer, render any prolonged investigation of the facts of this case unnecessary. The admission arose in the following circumstances. Mr. Hempson, who conducted the case on behalf of the Law Society before the disciplinary committee, had made an affidavit sworn on August 30, 1943, in which he set out the facts on which the charges against the solicitor were based. Paragraphs 8 to 25 inclusive in that affidavit set out the facts of nine cases in which it was alleged the solicitor committed a breach of the rules of 1936. At the beginning of the second day of the hearing before the disciplinary committee, counsel for the solicitor agreed, in effect, that the evidence contained in these paragraphs should be accepted as correct, subject to two minor alterations. The result is that it is unnecessary for the purposes of this judgment to set out the facts in these nine cases, as they are all recorded in these paragraphs of the affidavit. It is sufficient to say that in each of the nine cases the solicitor received instructions from one Ernest Clothier, a member of a body called the Ex-Regulars Association, to act for a named person who had sustained an accident, and accepted such instructions. The issue which was decided against the solicitor on the fifth charge was an issue of fact: Did he make reasonable inquiry before accepting instructions in each of these nine cases? On that issue Mr. Paull quite properly availed himself to the full of his right to a re-hearing, and he took us through a large part of the evidence given before the disciplinary committee, both oral and documentary. He had not personally represented the solicitor at either of the previous hearings, but before us he respectfully complained that the Divisional Court had unduly curtailed the re-hearing of the facts of the case. Having regard to these submissions we thought it right to hear him at length on the facts as well as the law; but he wasted no time and we are indebted to him for his careful review of the evidence. In the result, however, we agree with the Divisional Court's conclusions. The re-hearing before us, in our opinion, entirely justifies their endorsement of the disciplinary committee's finding that the solicitor failed to make reasonable inquiry.

It is important to consider the attitude which the Court of Appeal ought to adopt towards a second re-investigation of the disciplinary committee's findings of fact. There are two reasons for special caution. In the first place the disciplinary committee of to-day is a "specialized tribunal," created by Parliament to deal with questions of professional duty peculiarly within the knowledge of the profession itself, and for that reason constituted of members of that profession specially selected for their knowledge, experience and position by the Master of the Rolls (who in one sense is the head of that profession), or in his absence by the Lord Chief Justice. As Lord Hewart C.J. said, the intention was to make solicitors as far as possible masters in their own house (*In re a Solicitor* (1)). The second reason is that we ought to apply the general principle on which the House of Lords acts in regard to appeals from concurrent findings of fact of the two lower courts, viz., that unless such findings are vitiated by some error of law, the House will very rarely interfere with the findings of the first court. In considering the scope of the first

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(1) (1928) 72 Sol. J. 368, 369.

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principle, we see no reason why the conclusions of fact reached by the solicitors' statutory tribunal should be given any less weight than the decisions on fact of a judge of the High Court sitting without a jury. In regard to the second principle it is enough to refer to three decisions of the House of Lords. In *Owners of P. Caland* v. *Glamorgan SS. Co., Ld.* (1) and *McIntyre Bros.* v. *McGavin* (2), Lord Herschell L.C., held that it was not the practice of the House on appeal by way of rehearing to differ from concurrent findings of fact in two courts below, unless both courts " have so distinctly erred as to justify " [their] Lordships in saying that the concurrent findings of " these two courts ought not to stand." That view was again affirmed in the House in the case of *S.s. Mendip Range* (*Owners*) v. *Radcliffe* (3): see Lord Atkinson's opinion (4). In the present case Mr. Paull has failed to satisfy us that there was any error in the findings of the disciplinary committee, in spite of his careful review of what he told us were, in his submission, the most important parts of the evidence, oral as well as written.

This brings us to a contention, most strenuously argued by Mr. Paull, that proceedings before the disciplinary committee are governed by the rules of criminal law, or that such proceedings are, at any rate, quasi-criminal. On this footing he suggested that the proceedings were irregularly conducted in certain respects. Whether the proceedings can properly be described as quasi-criminal or not, in our opinion there is nothing in the statutes or rules which binds the disciplinary committee to the rules of criminal law. Even if the committee were so bound, we are satisfied that no miscarriage of justice has been occasioned by any of the matters referred to by counsel.

The next complaint was that the disciplinary committee, in the penultimate paragraph of their findings, referred to an order of the committee dated April 28, 1939, whereby the solicitor was ordered to pay the costs of proceedings in respect of alleged breaches of the rules of 1936. In that case the committee had found that the alleged breaches had not been substantiated, but they considered that the solicitor had himself to blame for the allegations being made against him. Mr. Paull suggested that this previous order of the committee was introduced into the proceedings at a time when the solicitor was unable to give an explanation, and further, that this paragraph was wholly irrelevant to the matters in question. In our view this complaint is not well founded. In the first place, this incident was put to the solicitor in cross-examination, and his counsel availed himself of an opportunity to explain the facts in his final speech. In the second place, we think that this matter was relevant for the purpose of showing that the solicitor had a warning in 1939, which brought to his attention the necessity of making reasonable inquiry before accepting instructions in respect of accident cases. These are, we think, the only criticisms which need to be mentioned in this judgment, and we desire to say that in our view Mr. Hempson discharged a difficult task with fairness and skill, and the disciplinary committee carried out their duties with great care and efficiency. The facts of the case were somewhat complicated, and in our view the findings and order of the disciplinary committee is an admirable document, notwithstanding the small errors to which I have already referred.

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(1) [1893] A. C. 207, 215.

(2) Ibid. 268, 276.

(3) [1921] 1 A. C. 556.

(4) Ibid. 575, 576.

[His Lordship then dealt with the question of sentence, and after reviewing the evidence and the nature of the practices against which the regulations were directed found it impossible to interfere with it ; and then continued :] For the sake of the public it is of the utmost importance to enforce on all solicitors the high standard of duty which rests upon them to make such full inquiries as will really safeguard the poorer and more ignorant members of the public from being exploited for gain by unscrupulous men at times of their distress. "Ambulance "chasing" is an opprobious slang term, but it describes an abuse, and rule 4 (*c*) is directed to the prevention of that abuse by insisting on the regular duty of "reasonable inquiry" in advance. By the time to which the first of the present charges in these proceedings relates, the rule was already five years old. In addition, the solicitor was keenly alive to the defects of character and conduct which on his own confession made Clothier a dangerous "introducer" within the meaning of r. 4 (*b*). The mere existence of rule 4, put forward by the Law Society, and passed into law at their request under the Act of 1933 by the approval of the Master of the Rolls, shows that there is a real danger of some solicitors, whether intentionally or only negligently, shutting their eyes to the danger to the public of touting in its many forms ; and fools often do as much harm as knaves. Comparable danger had to be dealt with by legislation in the case of moneylenders, e.g., in s. 5, sub-s. 3, of the Moneylenders Act, 1927.

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One further point remains to be noted. Mr. Paull argued that the sixth charge was, as he put it "bad for duplicity" in that it was merely a repetition, in somewhat different words, of the fifth charge. He also objected that the sixth charge was not based upon any of the rules of 1936 and he suggested that the disciplinary committee, having found against the solicitor on charges five and six, might have given him a heavier sentence than they would have given him if he had only been convicted of one charge. In our view the sixth charge is based on the same facts as those which gave rise to the fifth charge, and it would appear that the sixth charge is not based upon any of the rules of 1936, but is based on the general rules of professional conduct which ought to be observed by solicitors, apart from any statutory provisions. However that may be, and assuming in favour of the solicitor (without deciding the point) that the sixth charge should not have been made, we cannot think that the existence of that charge, or the finding of the committee in respect of it, in any way affected the sentence which was passed by the committee. That which was culpable was the failure of the solicitor to make reasonable inquiry in the nine cases to which we have already referred, and it is in respect of that breach of the rules of 1936 that the committee imposed the sentence. We cannot believe that the sentence was any more severe by reason of the fact that this one offence was charged in two different ways. The solicitor must pay the costs of this appeal.

Appeal dismissed.

Solicitors for appellant: *Arthur Dollond & Co.*
Solicitors for respondents: *Hempsons.*

W. L. L. B.

Dictum of MACKINNON, L.J., at p. 379. 380, *dissented from.* SMITH *v.* MATHER. [1948] 1 All E.R. 704.

Followed. PHILLIPS *v.* WELTON. [1948] 2 All E.R. 845.

Distinguished. **LEWIS *v.* REEVES [1952] 1 K.B. 19**

C. A.

1945

Apr. 13.

MacKinnon, Lawrence and Morton L.JJ.

SUMMERS *v.* DONOHUE.

Landlord and tenant—Rent restriction—Statutory tenancy—Death of tenant—Inheritance of tenancy—Death of second tenant—Claim to further tenancy by inheritance—Meaning of "tenant"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (g).

The words "a tenant" in the definitive part of s. 12, sub-s. 1 (g), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, refer, in both places where they occur, only to the original contractual or statutory tenant, on whose death his widow or other member of his family may continue in possession as a statutory tenant. They do not include such widow or other member of the "tenant's" family, so as to give a further right to continue the tenancy on the death of such widow or other member of the family.

Pain v. *Cobb* (1931) 47 T. L. R. 596, approved.

APPEAL from Kingston-on-Thames county court.

The plaintiff was the owner of a freehold dwelling-house at Kingston-on-Thames, to which the Rent Restrictions Acts applied. The house was let in 1916 to the defendant's father at a rent of 9*s*. or 9*s*. 6*d*. a week. In 1920, the rent was increased to 12*s*. 6*d*. per week. That increase corresponded in amount with the increase permitted under the Rent Restrictions Acts then in force, but there was no evidence as to compliance with the requirements of the Acts, including the termination of the contractual tenancy by notice to quit and the service of a valid notice of increase of rent, and it was therefore uncertain whether from 1920 till his death in 1927 the defendant's father was in possession as a contractual or as a statutory tenant. From his death in 1927 his widow continued in possession of the house either under the contractual tenancy, if it then subsisted, or by virtue of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). In 1944 the widow, the defendant's mother, died, and the defendant, who was her only relative living with her in the house, remained in possession.

The plaintiff claimed possession, alleging that the defendant, having no contractual tenancy with her, was merely a trespasser. The defendant claimed that she was a statutory tenant and that the plaintiff was not entitled to possession except in accordance with the provisions of s. 3 of the Act of 1933. The county court judge came to the conclusion that he ought to infer that the formal necessities for an increase of rent, including a notice to quit, had been complied with when the rent was increased in 1920; that the defendant's father had thenceforward been a statutory tenant, and that the defendant's mother had inherited the statutory tenancy under s. 12, sub-s. 1 (*g*), of the Act of 1920. He held that he was bound by *Pain* v. *Cobb* (1) to decide that there could be only one devolution of a statutory tenancy on death, and that the defendant was not entitled to the protection of the Acts. The defendant appealed.

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(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3, sub-s. 2. "Notwithstanding any agreement to "the contrary, where the rent of "any dwelling-house to which "this Act applies is increased, no "such increase shall be due or "recoverable until or in respect "of any period prior to the "expiry of four clear weeks, or, "where such increase is on account "of an increase in rates, one "clear week, after the landlord "has served upon the tenant "a valid notice in writing of his "intention to increase the "rent . . . ."

Section 12, sub-s. 1: "For the "purposes of this Act, except "where the context otherwise "requires :— . . . . (*g*) . . . . the "expression 'tenant' includes "the widow of a tenant dying "intestate who was residing with "him at the time of his death, "or, where a tenant dying intestate leaves no widow or is "a woman, such member of the "tenant's family so residing as "aforesaid as may be decided in "default of agreement by the "county court."

The words "dying intestate" were repealed by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935.

Sidney Isaacs for the defendant. The county court judge was wrong in holding that the onus was on the defendant to prove a statutory tenancy. The plaintiff has not discharged the onus of showing a termination of the original contractual tenancy with the defendant's father. Admittedly there was no notice to quit, and therefore it was for the plaintiff to establish that a notice to increase the rent had been served which would operate retrospectively as a notice to quit under the Rent Restrictions (Notices of Increase) Act, 1923. But the evidence is equally consistent with an increase of rent by agreement. If that were the case the contractual tenancy would continue thereafter, and devolve upon the widow and the defendant successively. The county court judge was not entitled to draw the inference or act on the presumption that the rent had been increased under the Rent Restriction Acts, and that there was therefore a statutory tenancy from 1920.

If that submission is wrong, the question arises whether the defendant is entitled to a statutory tenancy under s. 12, sub-s. 1 (*g*). *Pain* v. *Cobb* (1) was wrongly decided and should not be followed. It was not fully argued. It is submitted that that decision in effect introduces the word "original," without justification, before the word "tenant" in s. 12, sub-s. 1 (*g*), i.e., "the expression 'tenant' includes the widow "of an original tenant, etc." The omission of the word "original" from sub-s. 1 (*g*) seems to be deliberate, for in s. 12, sub-s. 1 (*f*), the Act does refer in terms to the "original tenant." Swift J. appears to have based his judgment on two grounds,

(1) (1931) 47 T. L. R. 596.

first, that the right of a statutory tenant was a purely personal right, and secondly, that if more than one succession were permitted under s. 12, sub-s. 1 (*g*), it might create a right in perpetuity in the tenant's family. The right of a statutory tenant is undoubtedly a personal one, but the expression "tenant" must be construed liberally in this sub-section. There are no words of limitation which cut down or restrict the operation of this provision, and the words must be given their plain meaning, whatever inconvenient or even absurd result might arise from so doing. If the house falls within the Acts the identity of the tenant is immaterial: *Salter* v. *Lask* (1). Once a person has succeeded to the position of statutory tenant under s. 12, sub-s. 1 (*g*), he must be treated as tenant for all purposes, and on his death the sub-section must, if necessary, be applied again in order to discover his successor, without inquiring into his antecedents or the circumstances in which he became statutory tenant. In the present case, when the widow of the original tenant succeeded to her husband's right she became statutory tenant, and on her death the defendant was entitled to succeed her by virtue of s. 12, sub-s. 1 (*g*).

Fortune for the plaintiff. The judge was right in holding that once the plaintiff has established her title to the freehold, the defendant must establish her right to possession. He was right also in inferring a statutory tenancy after 1920, for s. 3, sub-s. 2, of the Act of 1920 prohibits any increase of rent otherwise than under the Act, "notwithstanding any agreement "to the contrary." He was entitled to presume that the increase was made lawfully. The policy of the Act was to prevent increases by agreement. That being so, the defendant was driven to rely on a double succession under s. 12, sub-s. 1 (*g*), and the county court judge was bound by *Pain* v. *Cobb* (2) to decide that point against her. Though this court is not bound by that decision, it is submitted that it is right and should be followed.

Isaacs replied.

MacKinnon L.J. This case illustrates yet another of the many difficult problems which arise under the Increase of Rent and Mortgage Interest (Restrictions) Acts. The question really is whether the defendant can allege that she was a tenant within the meaning of the Act, so as to have the protection of s. 3 of the Act of 1933. If her mother was a contractual tenant with the plaintiff, then clearly the defendant might claim the benefit of the Act under s. 12, sub-s. 1 (*g*), of the Act of 1920, as being, from the death of the contractual tenant, a member of the tenant's family residing with her at the time of her death. It is therefore necessary for the plaintiff to show that the mother was not a contractual tenant, but was only a statutory tenant, who had herself succeeded under s. 12, sub-s. 1 (*g*), to her husband's statutory tenancy. That the plaintiff sought to show by alleging that in 1920 notice to quit had been given to the father, and that thereafter he remained in possession only as a statutory tenant whose contractual tenancy had been determined by notice to quit. It is not surprising, owing to the lapse of time, and the fact that this was a small property, occupied by perhaps humble people, that strict proof of the giving of that notice was not forthcoming, but reliance was placed on the fact that in 1920 an increase of rent was assented or submitted to by the father, which was exactly the amount of the increase which would be permitted by the Act of 1920. The county court judge came to the conclusion that he ought to infer that the formal necessities for an increase of rent had been complied with at that change of the rate of rent in 1920, and those formal necessities would include giving notice to quit. At one period during the argument we were disposed to think that that inference was not one which could be legitimately drawn by the county court judge, because it was quite likely that the change in the rent was made by agreement, without any notice to quit. But Mr. Fortune has drawn our attention to s. 3, sub-s. 2, of the Act of 1920, which makes any agreement to increase the rent without a formal notice in the form prescribed by the Act invalid and illegal. That, I think, adds a very material consideration to those which are to be taken into account in determining whether the county court judge was right in his assumption that there was in fact, though strict proof of it is lacking, a notice to quit served on Mr. Donohue in 1920, so that he became thereafter a statutory tenant. Having regard to that provision as to the illegality of any increase of rent without serving such a notice, I think the county court judge was right in drawing that inference.

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(1) [1925] 1 K. B. 584.

(2) 47 T. L. R. 596.

The result of that is that when the father died in 1927 he was a statutory tenant. The mother's right during her occupation from 1927 to 1944 was a statutory tenancy under s. 12, sub-s. 1 (*g*), of the Act of 1920, as being the widow of a tenant residing with him at the time of his death. If the defendant, then, is to say: "I am a tenant and protected by s. 3 of the "Act of 1933," she must also rely on the definition of "tenant" in s. 12, sub-s. 1 (*g*), as constituting her a statutory tenant. The argument for the defendant is that she comes within the provision as being a member of the tenant's family on the death of a tenant, and that "a tenant" on the third occasion on which those words occur in this definition means the enlarged notion of a tenant which is itself defined by the whole clause. I think that contention is erroneous. This part of the sub-section is setting out and defining the expression "tenant" which is in inverted commas. That expression in inverted commas is defined as including somebody, who is referred to twice over, with the conjunction "or" between the two occasions on which he or she is mentioned. The expression "tenant" includes the widow of a tenant, or where that same person, a tenant, leaves no widow, some other member of his or her family. I do not think it is possible or right to extend that definition so that, on the third occasion where the word "tenant" occurs, "tenant" has to be put in inverted commas and included in the person whose personality is being defined in the following words. Where the words "a tenant" occur twice over in the definition part of the section, I think they refer to the same person, and only to one person, that is to say to the original contractual or statutory tenant who has died, and that it is not right to continue that in a succession of descendants, so that under the second part of the definitive portion of the sub-section "a tenant" can include one who has become an artificial tenant by inheritance from the original tenant under the earlier part of the definition.

In the result, I do not think that the defendant in this case does come within the definition of "tenant" in that sub-section. That was, in my opinion rightly, held in *Pain* v. *Cobb* (1), by which the county court judge held, of course rightly, that he was bound, though he had a doubt whether he would have come to the same conclusion himself. I think if the matter had been fully argued out before him as it has been here, he would have come to the conclusion that *Pain* v. *Cobb* (1) was rightly decided, and that his decision on that part of the case was therefore correct. In the result, the appeal fails and must be dismissed with costs.

(1) 47 T. L. R. 596.

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LAWRENCE L.J. I agree and I only wish to add this: I think that the presence of the words "dying intestate" which were in s. 12, sub-s. 1 (*g*), as originally enacted still further imports the view that the word "tenant" in the two places to which my Lord has referred means the same person.

MORTON L.J. I agree.

Appeal dismissed.

Solicitors for defendant: *Good, Good & Co.*
Solicitors for plaintiff: *Badham, Comins & Sloman.*

I. W. H.

Applied. LLEWELLYN *v.* HINSON. [1948] 2 All E.R. 95.

Followed. LLEWELLYN *v.* HINSON. [1948] 2 K. B. 385

Distinguished. HARRISON *v.* HOPKINS. [1949] 2 All E.R. 597.

Distinguished. HARRISON *v.* HOPKINS [1950] 1 K. B. 124

C. A.
1945
Apr. 23.

MacKinnon, Lawrence and Morton L.JJ.

SHARPE *v.* NICHOLLS.

Landlord and tenant—Rent restriction—Claim for possession by personal representatives on ground that one of them required possession for her own occupation—Objection to form of action not taken at trial, nor in notice of appeal—Order for possession, subject to grant of a Rent Act protected tenancy of half the house, with joint use of kitchen and offices—Jurisdiction—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sch. I., para.* (*h*).

On the death of the landlord of a cottage, to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied, his personal representatives, one of whom was his widow, claimed possession under para. (*h*) of sch. I. of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, on the ground that the widow required the premises for her own occupation. No objection was taken at the trial, nor in the notice of appeal, to the form of action, but at the trial the widow was tacitly treated as sole plaintiff; it was assumed that she was beneficially entitled to the cottage, and the case was argued on the question of relative hardship. The judge made an order "that the defendant do give the plaintiff (*sic*) possession . . . . "subject to plaintiff allowing defendant a Rent Act protected "tenancy of the front two rooms, together with joint use of "kitchen and out-offices." The defendant appealed, naming the widow alone as respondent, on the grounds "that the judge "misdirected himself in that he could not order that a tenancy "should be created of the said two rooms with joint use of kitchen "and out-offices protected by the Rent Restriction Acts, and that "the said judgment contravenes the provisions of the Rent "Restriction Acts." At the hearing of the appeal defendant's counsel contended that personal representatives could not claim under para. (*h*) of sch. I. to the Act of 1933 on behalf of one of them :—

Held, (1.) that the order for possession, subject to a Rent Act protected tenancy of two rooms with joint use of kitchen and out-offices was not one which the judge had power to make, since it amounted to a sharing of the house, and not to the letting of a separate dwelling-house within the Rent Restriction Acts.

Neale v. *Del Soto*, ante p. 144, applied.

(2.) that personal representatives were not " landlords " within the meaning of para. (*h*) of sch. I. to the Act of 1933, and could not claim possession under that paragraph on behalf of one of their number who required possession for her own occupation ; and

(3.) by MacKinnon and Lawrence L.JJ., Morton L.J. dissenting, that since the insertion of the invalid condition might have influenced the county court judge in deciding the question of relative hardship, there ought to be a new trial at which it should be open to the defendant to take the point that personal representatives could not claim under para. (*h*) on behalf of one of them, and to investigate the widow's beneficial interest in the premises : by Morton L.J. that the plaintiffs having failed to bring themselves within para. (*h*), there was no jurisdiction, either in the county court or in the Court of Appeal, to make an order for possession, and that the appeal should be allowed, and judgment entered for the defendant.

APPEAL from Leicester county court.

A cottage to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied, consisting of four rooms in addition to a kitchen and out-offices, was let many years ago by the freeholder to the defendant, Mrs. Mary Lizzie Nicholls, at 7*s*. 7*d*. a week. On the death of the landlord his widow desired the cottage for her own occupation, and proceedings were started in the county court by the widow, Mrs. Violet Beatrice Sharpe, and her nephew, Leslie Allen Sharpe, an agricultural worker, claiming as the personal representatives of the deceased landlord. The particulars of claim stated that " The plaintiffs claim " possession of the said premises which are required by the " said Violet Beatrice Sharpe for her own occupation." The claim, that is to say, was based on para. (*h*) of the First Schedule to the Act of 1933 (1). The defendant alleged that she

(1) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1 : " No order or judgment for the " recovery of possession of any " dwelling-house to which the " principal Acts apply or for the " ejectment of a tenant therefrom " shall be made or given unless " the court considers it reasonable to make such an order or " give such a judgment, and " either (*a*) the court has power " so to do under the provisions " set out in the First Schedule to " this Act ; or (*b*) the court is

was unable to obtain alternative accommodation, that she had occupied the premises for thirty-six years, and would suffer great hardship if an order was made.

At the hearing it was apparently assumed, without objection by the defence, that in effect it was a claim by the widow to possession of her late husband's house for her own occupation, and the case was argued entirely on the question of hardship. The judge's note made no reference to the second plaintiff, and the notice of appeal was headed "Between Mary Lizzie "Nicholls (Widow) appellant, and Violet Beatrice Sharpe "(Widow) respondent," without reference to Leslie Allen Sharpe. Eventually the judge made the following order: "It is ordered that the defendant do give the plaintiff possession "of the said land on the 6th day of April, 1945, subject to "plaintiff allowing defendant a Rent Act protected tenancy "of the front two rooms, together with joint use of kitchen "and out-offices. Rent to be apportioned by registrar, "failing agreement between the parties." The defendant appealed.

Fay for the defendant.
Guy Dixon for the plaintiffs.

MacKinnon L.J. This is a case arising under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and it illustrates yet once more the almost insuperable difficulty of applying the obscure and complicated provisions of those Acts to the particular facts that occur in the life of the people.

"satisfied that suitable alternative accommodation is available "for the tenant . . . ."

Sch. I.: "A court shall, for "the purposes of s. 3 of this Act, "have power to make or give an "order or judgment for the recovery of possession of any "dwelling-house to which the "principal Acts apply . . . . "without proof of suitable alternative accommodation (where the "court considers it reasonable so "to do) if . . . . (*h*) the dwelling-"house is reasonably required by "the landlord . . . . for occupation "as a residence for (i.) himself; "or (ii.) any son or daughter of "his over eighteen years of age; "or (iii.) his father or mother: "Provided that an order or "judgment shall not be made or "given on any ground specified in "para. (*h*) of the foregoing provisions of this Schedule if the "court is satisfied that having "regard to all the circumstances "of the case, including the "question whether other accommodation is available for the "landlord or the tenant, greater "hardship would be caused by "granting the order or judgment "than by refusing to grant it."

[His Lordship stated the facts, and the terms of the judge's order, and of the notice of appeal, and continued :] In this court Mr. Fay has taken two points. He first of all takes a point, which was never taken in the defence, and was never mentioned or argued, as is quite obvious, in the court below, and which is not mentioned in the notice of appeal, except so far as it may be very generally included in the allegation " That the said " judgment contravenes the provisions of the Rent Restriction " Acts." That point is that the plaintiffs in this case, who were claiming possession, are two persons, Mrs. Sharpe, the widow, and Leslie Allen Sharpe, the nephew, who state that they are the personal representatives of Mrs. Sharpe's husband. As I have said, that point was not taken below, and no evidence was given in regard to it. It is quite obvious that the existence of Leslie Sharpe was either overlooked or was tacitly admitted by the defendant's representative to be quite immaterial. As the result of no such point being taken, we do not know whether the husband died intestate, or whether the personal representatives are administrators of a will which appoints no executors. We do not know what was the size of the estate or whether by virtue of the provision of the Administration of Estates Act, 1925, s. 46, giving the first 1,000*l*. to the widow, the whole estate practically vests in the plaintiff widow. If it was not so, we do not know whether the administrators before the hearing had made a vesting order vesting this little house in the widow. All these facts are totally unascertained by reason of the fact that the defendant never took the point in the court below.

The other objection, specifically taken in the notice of appeal, is that the judge was wrong in ordering that a tenancy should be created, under the protection of the Rent Restriction Acts, of two rooms, with the joint use of the kitchen. I agree that that was not an order which he had power to make under the Acts, and I think the decision of this court in *Neale* v. *Del Soto* (reported since the hearing of this case) (1) shows that he was in error in that respect. If he was so, it would rather be a matter for a cross-appeal by the plaintiff, if she was otherwise entitled to possession of the house, to have that condition deleted as one which the judge was not empowered to make. But no doubt the insertion of that invalid condition was part of the reasoning which the county court judge took into account in considering the comparative degree of hardship caused by

(1) Ante, p. 144.

granting the possession of the house to Mrs. Sharpe, or refusing it in favour of Mrs. Nicholls.

In these circumstances the question is, what is to be done in this case ? I regretfully come to the conclusion that it ought to be re-heard by some other judge and, subject to the protection of the plaintiffs in the matter of costs, in all the circumstances of the case I think it ought to be open to the defendant at the re-hearing properly to take the first point which has been argued before us by Mr. Fay, as regards the parties who were claiming and the absence of proof that Mrs. Sharpe, one of the plaintiff administrators, is in effect the person beneficially interested in this little house. That proof is necessary to enable a claim to be made on her behalf as the "landlord" within the provisions of sub-s. (*h*) of the sch. I to the Act of 1933.

LAWRENCE L.J. I agree. The first point is put most strongly by saying that the widow, Mrs. Sharpe, has not proved that she was the "landlord" at the time of the issue of the summons ; but she may have been the "landlord" by reason of being beneficially entitled to the property. It was perfectly open to the defendant to admit that fact. I think the proper inference from the course which the trial in the county court took is that the defendant did admit that the widow was beneficially entitled to the premises and was the "landlord" within the meaning of the Acts. As my Lord has pointed out, no such point was ever taken. The order of the county court judge referred to her as the plaintiff and did not mention the other plaintiff, and the defendant's notice of appeal to this court also treated the parties in the same way. In view of those facts, and particularly in a case in the county court, where matters of proof and of form are not gone into with the same particularity as they are in the High Court, I think the proper inference to draw is that the defendant admitted that Mrs. Sharpe was the "landlord" within the meaning of the Act. I think, therefore, that it is a matter of very great doubt whether the defendant ought to be allowed to raise that point again ; but I am prepared to concur in the judgment which is proposed by my Lord.

MORTON L.J. Counsel for the defendant has put two arguments before this court. The first is that the plaintiffs have failed to bring themselves within para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and, therefore, the county court judge should have dismissed the action. The second point is that the county court judge made an order which was impossible, having regard to the decision of this court in *Neale* v. *Del Soto* (1). I shall deal with the second point first and I can deal with it quite shortly, having regard to the judgments which have already been delivered. I agree that the county court judge went wrong in making the order that he did make. It is true that *Neale* v. *Del Soto* (1) was a decision upon the facts then before this court, but I think that the result of such an order as was made by the county court judge here would be, to quote *Neale* v. *Del Soto* (2), in substance a sharing of the house. It is in each case a question of degree whether there is a letting of part of a house as a separate dwelling within the meaning of the Act. But in the case of a very small cottage like this it seems to me that if each party has two rooms, and they share the use of those very important rooms, the kitchen and the rooms which are sometimes referred to as the " usual offices," the decision in *Neale* v. *Del Soto* (1) applies, and the order which the county court judge made was impossible, in that he ordered that there should be a Rent Act protected tenancy of two rooms together with the joint use of kitchen and out-offices. In my view such a tenancy would not be a Rent Act protected tenancy. I agree that if the first point taken before this court is not a good one, or is not open to the defendant, there should be a new trial before another judge.

For my part, however, I think that the first point argued before us is a good one and is open to the defendant, that the appeal should be allowed, and that judgment should be entered for the defendant. It is true that the point is not specifically taken on the pleadings and does not appear to have been taken at the hearing. That is a matter, I think, which could be dealt with when the question of costs comes to be considered. It is also true that the notice of appeal, although it does contain the paragraph " That the said judgment contravenes the " provisions of the Rent Restriction Acts," does not take this point with any particularity. That, again, I think, is a matter which could be dealt with in dealing with the costs. It seems to me that, unless the plaintiffs alleged and proved the necessary facts to bring them within para. (*h*) of sch. I. to the Act of 1933,

(1) Ante, p. 144.

(2) Ibid. 147.

it was not within the power of the county court judge to make an order for possession, and that this is a point of law which is open to the defendant in this court. We have been referred to the observations of Goddard L.J. (as he then was) in *Davies* v. *Warwick* (1) where the following passage occurs: " The cases cited show that the effect of section 3 of the Act " of 1933, which restricts the power of the court to grant orders " for possession, is not to afford a statutory defence to a party, " but to limit the jurisdiction of the court. If the court of " trial or the Court of Appeal finds that the case is one in which " it is debarred from granting an order for possession, it is the " duty of the court to refuse it, even though the statute is not " raised by the defendant, because there is no jurisdiction to " grant it, but that, in my opinion, is all that the cases quoted " establish."

In my view, the present case is one in which the Court of Appeal finds that it is debarred from granting an order for possession, and I shall now proceed to state the reasons which lead me to that conclusion. The statement of claim has been referred to briefly. I think I must read the whole of it. It is quite short and it begins: " 1. The plaintiffs are the personal " representatives of Allen Sharpe formerly of 35, The Square, " Littlethorpe, Narborough, in the County of Leicester." It does not state whether they were the executors of Allen Sharpe or administrators of Allen Sharpe, with or without the will annexed. It goes on: " The plaintiffs as such personal " representatives as aforesaid "—and I emphasize these words —" are the owners of the property 11, Princess Street, Narborough, aforesaid, which said property was let to the " defendant on a weekly tenancy at a rental of 7*s*. 7*d*. per " week "—that is to say, the plaintiffs are alleging in terms: " We are the owners as personal representatives." Thus they exclude by their own pleading any possibility that they had vested the fee simple in Mrs. Sharpe even if they were entitled to do so under the will or as the result of an intestacy. Paragraph 3 is: " The said tenancy was duly determined by " one week's notice to quit in writing dated September 7, 1944, " expiring on September 18, 1944." Then it goes on: "The " plaintiffs claim possession of the said premises which are " required by the said Violet Beatrice Sharpe for her own " occupation." The defence is simply this: " The defendant " disputes the plaintiffs' claim because she is unable to obtain

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(1) [1943] K. B. 329, 336.

"alternative accommodation. She has occupied the premises "for thirty-six years and would suffer great hardship if an "order was made." That defence is clearly intended to set up the provisions of the Rent Restrictions Acts.

I now turn to the Acts to see what it was necessary for the plaintiffs to do in order to induce the court to make an order in their favour for possession. [His Lordship read the relevant parts of s. 3 and sch. I. of the Act of 1933 and continued :] There was no evidence at the trial as to the beneficial ownership of this particular cottage. The plaintiffs' whole case, as I have shown from their pleadings, is based upon the allegation that they were the owners as personal representatives. I cannot find any admission at the trial in any shape or form that the widow had any beneficial interest in the house. I do not know in the least who was entitled to the house. For all I know, Mr. Sharpe may have made a will leaving it to a nephew or to any other person. In those circumstances, one must consider whether it can be said that the "dwelling-house "is reasonably required by the landlord for occupation as a "residence for himself or herself" when the plaintiffs are legal personal representatives suing in that capacity and one of them wants to live in the house. In my opinion, such a case is not within the terms of para. (*h*) of sch. I. at all. Strange results would follow if that were not so. For instance, you might have four legal personal representatives, none of whom was related to the testator at all, and one of them might require the house as a residence for himself or herself, having no beneficial interest whatsoever in the property. I am clearly of opinion that such a case could not possibly be within the terms of para. (*h*). It is also to be observed that the words "himself or any son or "daughter of his . . . . or his father or mother" seem to refer to a person who is the landlord not in the sense that he or she is one of several personal representatives but in the sense that he or she is the sole owner of the property subject to the tenancy. It seems to me, therefore, that the plaintiffs entirely failed to prove that they came within para. (*h*), and that if they failed to prove that they came within para. (*h*) the words of s. 3 of the Act absolutely precluded the county court judge, and would preclude this court, from making any order for the recovery of possession.

Perhaps I should mention the definition clause which was referred to in the course of the argument. There is a definition clause which includes a definition of "landlord" in the Act of

1920, and it appears in s. 12, sub-s. 1 (*g*), of that Act. It is as follows: "The expression 'landlord' also includes in relation "to any dwelling-house any person, other than the tenant, "who is or would but for this Act be entitled to possession of "the dwelling-house." That definition is not set out in the Act of 1933 and it is, I think, of some importance that there is a definition section in the Act of 1933, namely, s. 16. That section repeats some but not all of the definitions in the Act of 1920, and it does not repeat any definition of "landlord." Section 18 of the Act of 1933 provides, by sub-s. 1: "This Act "may be cited as the Rent and Mortgage Interest Restrictions "(Amendment) Act, 1933, and this Act and the principal Acts "may be cited together as the Rent and Mortgage Interest "Restrictions Acts, 1920 to 1933." We were not referred to any other section bearing on the matter. It is to be observed that s. 18 does not say that the Act of 1920 and the Act of 1933 shall be read and construed as one Act, and I feel considerable doubt whether the definition of "landlord" which appears in the former can be said to be imported into the latter Act. Whether that is so or not, and even assuming that the definition is imported into the Act of 1933, I am of opinion that the expression "the landlord" as it is used in para. (*h*) of sch. I. to that Act cannot apply to one of several legal personal representatives. I do not think that my brethren differ from the construction which I have put upon para. (*h*), but they think there should be a re-hearing, for the reasons which they have stated.

For my part, I think that the county court judge should have dismissed the action, and that we should allow the appeal and make an order dismissing the action, subject to such provision as to costs as may be reasonable. I need not go further into that, however, for as my brethren differ from me as to the course which should be adopted the order will be as they direct.

New trial ordered.

Solicitors for defendant: *Bennett, Ferris & Bennett, for Bray & Bray, Leicester.*

Solicitor for the plaintiffs: *A. H. Headley, Leicester.*

J. W. H.

LEGON *v.* COUNT.

C. A.
1945
Apr. 23.
MacKinnon, Lawrence and Morton L.JJ.

Practice—County court—Claim for damages—No amount specified—Jurisdiction—Power to allow amendment restricting damages claimed to amount within county court jurisdiction—County Court Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 40, 42, 64—*County Court Rules,* 1936—*Or.* 7, *rr.* 1, 2—*Or.* 15, *rr.* 1, 6.

Where proceedings are brought in the county court for damages and the plaintiff fails to specify the amount of damages, the county court judge has power to allow the plaintiff to amend by restricting his claim for damages to an amount within the jurisdiction of the court.

Judgment of Scrutton L.J. in *Upton* v. *Farmer* (1930) 142 L.T. 526 to this effect approved.

Appeal from Poole county court.

On January 11, 1945, the plaintiff, Bernard Legon, brought proceedings in the county court against the defendant, W. N. Count, for damages. By the particulars of claim as amended the plaintiff claimed to be the weekly tenant of the defendant of an unfurnished flat No. 2, Highwood Road, Parkstone, at a weekly rent of 26*s.* 6*d.* and alleged that on January 8, 1945, the defendant had trespassed on the flat by barring the entrance and refusing him access, in breach of the Courts (Emergency Powers) Act, 1943, s. 1, sub-s. 2 (ii.) (iv.). He therefore claimed damages in respect of the trespass and breach of the Act, and also claimed the protection of the Rent Restrictions Acts, 1920 to 1939. The defendant by his defence denied liability. Neither the praecipe nor the particulars of claim stated the amount of damages claimed.

On the case coming before him the county court judge at once took the point that as no amount was stated in respect of the claim for damages, the damages might be in excess of the amount which the county court had jurisdiction to award. He therefore held that he had no jurisdiction to entertain the action and consequently no power to allow an amendment, as asked, restricting the damages claimed to an amount not exceeding 100*l.* He also refused an adjournment and dismissed the action. The plaintiff appealed.

E. S. Fay for the plaintiff: The county court judge was in error in refusing to hear the action, first, because in so far as the claim was based on the Rent Restrictions Acts the county court was free to deal with it under s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920. That has been held to cover a claim for possession where the tenant is a statutory tenant. [MORTON L.J.: The issue in this case was whether the plaintiff was a statutory tenant.] The second reason why the county court judge was wrong is that even if the plaintiff's claim ought to have been for an amount of damages "within the jurisdiction of the "county court" (s. 109 of County Court Act, 1934), he ought to have allowed an amendment to be made limiting the damages claimed to an amount not exceeding 100*l.* as the plaintiff asked: see *Upton* v. *Farmer* (1), a case in which Scrutton L.J. and Slesser L.J. differed while sitting as a Divisional Court. The reasoning of Scrutton L.J. ought to be accepted. A clear power to allow an amendment is conferred by Or. 15, r. 1, of the County Court Rules, 1936–1941. That rule proves that the court may at any time amend any defect or error in any proceedings, and goes on to say that "all such amendments "as may be necessary for the purpose of determining the real "question in controversy between the parties shall be made, "if duly applied for . . . ." Further, under s. 64 of the County Courts Act, 1934, it is the duty of the court to transfer to the High Court proceedings not within the county court jurisdiction. Therefore the county court judge clearly had no jurisdiction to non-suit the plaintiff. [He also referred to *Dick* v. *Piller* (2).]

A. S. Diamond for the defendant: The defendant never took the point raised by the county court judge or resisted an amendment; and that continues to be his attitude. The only real point in issue is whether an amendment ought to be allowed, a point on which Scrutton and Slesser L.JJ. differed in *Upton* v. *Farmer* (1). That case arose under an earlier County Court Act and the rules made thereunder, but there is substantially no distinction from those now in force except that by s. 40, sub-s. 1 (2), the jurisdiction was extended to claims not exceeding 200*l.* Further, by s. 42, a party was given power to abandon a claim in excess of this amount. [He referred to *R.* v. *Cheshire County Court Judge* (3) and *Hopper* v. *Warburton* (4).] The Act of 1934 and the County Court Rules everywhere presuppose that the amount of any claim for damages will be quantified, but Or. 15, r. 6, states

(1) (1930) 142 L. T. 526.
(2) [1943] K. B. 497.
(3) [1921] 2 K. B. 694.
(4) (1863) 7 L. T. 722.

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that on a claim for an amount in excess of 200*l*. the excess can be abandoned.

E. S. Fay replied.

MacKinnon L.J. stated the facts and continued: The action of the learned judge was not taken or made on the invitation of the defendant's solicitor. We are told by the defendant's counsel that the defendant would not have opposed the application for amendment and did not desire to do so. But the judge refused to entertain the case and non-suited the plaintiff, with the result that the case was never heard. The plaintiff appeals on the ground that the judge was wrong in refusing a simple amendment limiting the damages claimed to an amount not exceeding 100*l*. We have had a good deal of discussion as to the provisions of the County Courts Act, 1934, conferring jurisdiction on the court, and as to the Rules. It is clear that it was technically an irregularity for the plaintiff to lodge his claim without specifying the amount of damages claimed. Not only does all the machinery of the county court contemplate that he should do so, the fee for hearing and various other things being fixed by the amount stated in the claim, but Or. 7, r. 2, expressly provides that where the claim exceeds 200*l*. and the plaintiff desires to abandon the excess, the abandonment shall be entered at the end of the particulars.

The question is whether the learned judge was right in deciding that, no amount having been specified, he had no power to allow the amendment. I think he was wrong. The matter has been discussed and decided in *Upton* v. *Farmer* (1). In that case the county court judge, in similar circumstances, had allowed an amendment, and on appeal it was heard by two lords justices sitting as a divisional court. They differed; Scrutton L.J. held that there was power to grant an amendment; Slesser L.J. thought there was not. According to the rule in such cases, the decision of the county court judge was therefore affirmed. In my view, the opinion of Scrutton L.J. was the more correct one; and as a result in this case I think the learned judge clearly had jurisdiction to allow the amendment asked for and that he ought to have done so.

I think that the order of this court ought to be: "Appeal "allowed; leave to amend the claim by adding the words "'not exceeding 100*l*.' after the word 'damages.' Order

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(1) 142 L. T. 526.

"for a new trial before the judge of the Southampton county "court; costs of the appeal to this court and of the first "hearing to abide the result of the new trial." I suggest that last provision because it was not the fault of the defendant's advocate that the point as to damages was taken below; and we have been told that he would have been agreeable to the amendment being made and to the real issue between the parties being tried.

Lawrence L.J. I agree and have nothing to add.

Morton L.J. I agree, and I wish only to add that counsel for the plaintiff said that it might be open to him to contend that it was unnecessary to specify the amount of damages claimed by reason of the provisions of s. 17, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920. However, he did not pursue that line of argument, and I desire to say that for my part I have not considered that argument nor, I think, has any member of this court.

MacKinnon L.J. Yes; I agree.

Appeal allowed.

Solicitors: *Peacock & Goddard, for Trevanion, Curtis & Ridley, Bournemouth; Barnes & Butler, for J. W. Miller & Son, Poole.*

H. C. G.

1944
Nov. 24; Dec. 12.
Evershed J.

MARINE AND GENERAL MUTUAL LIFE ASSURANCE SOCIETY *v.* FELTWELL FEN SECOND DISTRICT DRAINAGE BOARD.

Judgment—Execution—Application to stay—Statutory body—Public duties—Possible interference with performance of duties—Insolvency—Priority as between unsecured creditors—Jurisdiction to grant stay—R. S. C., Or. 42, r. 17.

The plaintiffs, who were the holders of four mortgages granted by the defendants' predecessors in title in 1888, recovered judgment for 1,490*l.* The defendants were a statutory body under certain private Acts and the Land Drainage Act, 1930, charged with the duty of draining an area of fen lands, and given the right of levying drainage rates on those lands. The plaintiffs proposed to levy execution, and the defendants now applied for a stay on the grounds (1.) that execution on their property would make it impossible for them to perform their duty of draining the land; (2.) that they were insolvent, and ought to be treated as an insolvent company in liquidation; (3.) that the levying of execution would result in giving to the plaintiffs a preference over other creditors of the same class, and that this was contrary to the terms of the judgment:—

Held, that though there was jurisdiction in the court to order a stay of execution, this was not a case where it should be exercised, and that the plaintiffs could not properly be deprived of their right to levy execution on any of the grounds put forward by the defendants.

Worral Waterworks Co. v. *Lloyd* (1866) L. R. 1 C. P. 719, followed and applied.

The plaintiffs brought an action to recover from the defendants 1,490*l.*, being 1,000*l.* principal and 490*l.* arrears of interest at 3½ per cent. per annum, secured by four mortgage deeds, or "assignments" issued by the defendants' predecessors in title, in 1888, on the security of land drainage rates to be levied by the board on lands within their district, under the powers of a private Act of 1849. The defendants were the successors of commissioners empowered by a series of private Acts from 1772 to 1849 to drain certain fen lands around Feltwell in the county of Norfolk, and for the purpose of meeting the expense to levy rates on such lands, and to borrow money on the security of those rates. The defendants had not paid any interest on these mortgages since 1929, and the present action was begun in 1939. The defendants admitted that the plaintiffs were entitled to judgment for 1,420*l.* on the mortgage debt, but they pleaded that they were insolvent, and that having regard to the small value of the land they were unable to levy rates sufficient to satisfy the plaintiffs' claim. They also contended that if they could raise rates to satisfy the debt, the effect would be to prefer the plaintiffs to other mortgagee creditors, some of whom had accepted a composition in discharge of their claims. The only issue in the action was as to the means by which the plaintiffs' claim could be enforced.

Evershed J., sitting as an additional judge in the King's Bench Division, on June 21, 1944, delivered a reserved judgment in favour of the plaintiffs for 1,490*l.* He held, however, that they were now unsecured creditors, as the Land Drainage Act, 1930, though it had not repealed the local Acts, had abolished the power to raise rates thereunder, and any rates raised or to be raised by the defendants under the Land Drainage Act, 1930, would not be a security for the plaintiffs' claim. He refused the plaintiffs' claim for a writ of mandamus directed to the defendants to raise rates to meet the demand, as he held that to grant it would have been futile, and if effective would have given the plaintiffs priority over all other creditors. He further declared that the defendants had no right to prefer other creditors to the plaintiffs, and granted an injunction to restrain them from so doing. The plaintiffs, having issued a writ of elegit, the sheriff, who had gone into "walking possession" of the defendants' pumping-station at Hockwold, threatened to seize and sell the machinery. The defendants therefore applied, under leave given subsequent to the judgment, for a stay of execution, principally on the ground that the levying of execution would make it impossible for them to perform their statutory duties, with the result that the lands of their district would be liable to be flooded.

K. Diplock for *Hubert Hull* on war service (*R. O'Sullivan K.C.* with him) for the defendants. The plaintiffs having recovered judgment have put the sheriff into "walking possession" of the defendants' pumping station at Hockwold, and threaten to levy execution by seizing and dismantling the machinery. If, as a result of seizure by the sheriff, the pumping-station machinery is stopped or removed, the main result will be that the defendants will be unable to carry out their statutory duties and the land will be flooded, thereby destroying the ability of its owners and occupiers to pay drainage rates, which are the only source for payment of the judgment. In those circumstances the court should order a stay of execution. The defendants are admittedly insolvent. The judgment obtained by the plaintiffs puts them into the position of a company ordered to be wound up, with no preference to creditors. The judgment also declares that the defendants ought not, as they claimed to be entitled to do, to prefer other creditors to the plaintiffs, but if execution is levied the effect will be to prefer the plaintiffs to other creditors, and that is, equally contrary to the judgment. A scheme of arrangement might be entered into under s. 4 of the Land Drainage Act, 1930.

Blanco White K.C. and *Holroyd Pearce* for the plaintiffs. There is no jurisdiction in the court to grant a stay of execution, except for a limited time, as with a view to an appeal: see R. S. C., Or. 42, r. 17, and s. 41 of the Judicature Act, 1925. The Companies Act, 1929, and the Bankruptcy Act, 1914, give power to stay execution in the case of winding up and bankruptcy, but those are statutory powers and do not apply here. To grant a stay such as that asked for is to nullify the judgment given. The judgment creditor cannot be deprived of his right to enforce judgment by levying execution: *Booth* v. *Walkden Spinning and Manufacturing Company* (1), *Worral Waterworks Co.* v. *Lloyd* (2), *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (3). The plaintiffs are anxious to preserve their right to levy execution, as they fear the defendants may prefer other creditors of the same class willing to accept a composition. There is no power under s. 4 of the Land Drainage Act, 1930, to make a scheme which extinguishes or scales down debts owed by a drainage board to creditors. Even if there were, the fact that such a scheme was proposed would be no ground for staying execution: *Booth* v. *Walkden Spinning and Manufacturing Company* (1).

EVERSHED J. This is an application made by the defendants, the Feltwell Fen Second District Drainage Board, under the liberty to apply given to them by the order of July 27, 1944, following the hearing of the action, for a stay of execution. The first point to which attention has been directed is this. The defendants are a statutory body having the duty, under a number of statutes, to drain what is called the Feltwell Fen Second District, in the County of Norfolk, and it was suggested, particularly having regard to the financial embarrassment or the insolvency of the board, that the court would exercise its jurisdiction, if such jurisdiction it has, to restrain execution on the assets of such a body.

Assuming, for the moment, that I have jurisdiction, my view is that there is no ground in principle why a successful plaintiff, who has recovered judgment against a body of this character, should not be entitled to the fruits of his judgment according to the law of the land, albeit that the levying of execution may have the effect of bringing to a standstill the operations of this statutory body. It seems to me that *Worral Waterworks Co.* v. *Lloyd* (2), establishes the proposition that the remedy of execution is available against a body of this character, and the court will not stay such an execution on that ground. It is suggested that the fact of insolvency in a body of this kind is a material consideration, because where there is insolvency there are no means of administering the assets of the insolvent body such as are available in the case of corporations or individuals. It does not seem to me that that is any ground for saying that a plaintiff should be deprived of his right as a judgment creditor to levy execution.

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(1) [1909] 2 K. B. 368.

(2) (1866) L. R. 1 C. P. 719.

(3) (1866) L. R. 1 H. L. 93.

I have so far assumed that the court has jurisdiction to grant a stay. It has been submitted by Mr. Blanco White that there is no jurisdiction to grant a stay such as is here suggested, because the discretion contained in Or. 42, r. 17, is merely to grant a stay for some limited time. In my judgment, reading that order and s. 41 of the Judicature Act, 1925, it would be open to the court, if the circumstances justified it, to grant a stay of execution by a judgment creditor against a body of this character.

But then there is a second point which has caused me more difficulty. The order which was drawn up contained a declaration that the defendants were not to be entitled to prefer, as against the plaintiffs, any other creditors under any of the assignments mentioned in the judgment, save such as may be entitled to be regarded as secured creditors, or otherwise to have priority. There was an injunction giving effect to the terms of that declaration. Regarding only the order, it is reasonably plain, on its strict language, that what the plaintiffs are here seeking to do could not involve any departure from the terms of the declaration, or any breach of the injunction, for clearly the obtaining by the plaintiffs (if they do obtain it) of any payment in satisfaction of their judgment, as a result of levying execution, would not be, or involve, a preference of any one creditor over another. The argument of Mr. Diplock, however, has proceeded on this line. He says that the form of that declaration must rest on the basis that the court was saying: This board is no longer in a position to pay the first comer first; the court by that declaration has assumed such a jurisdiction over the affairs of this board as to negative the ordinary right of a trading body, whether an individual or corporate, to pay its creditors as they come along, and once that is conceded, the whole principle on which the right of a creditor who has recovered judgment to levy execution rests is gone.

I do not accept that view of the case. It seems to me that the proper way to regard this order is to consider the issues before the court on the basis of which that order was made, and in this connexion I should make some reference to the terms of the judgment, which I suppose must be taken as containing the rationes decidendi on which the order was drawn up. Passages have been referred to in that judgment which I agree indicate that what I was then trying to say, or trying to achieve, was to put the defendant board as nearly as might be (to take the language of the judgment) in the position of an insolvent business in the course of being wound up. But I stated and intended that for a particular purpose. The plaintiffs in the action, who were admittedly entitled to judgment, also claimed that I should grant a mandamus to compel the defendants to levy a rate to discharge a part of the debt, and I came to the conclusion that it was not a case in which such an order ought to be made. That left the matter thus: it assumed that the plaintiffs, though entitled to judgment, had no remedy whatever and no means of enforcing it. Indeed, worse than that, it looked as though, notwithstanding that they had obtained judgment, the defendants might, if they were so minded, elect to pay off other creditors whom for various reasons they might regard as more deserving. That was emphasized by the fact that the defendants alleged in the defence that that was in law their right, whatever they elected to do in practice. It was in order to meet that, and to protect the plaintiffs against the result that they would have no remedy whatsoever, that I included in the judgment, and incorporated in the order, terms intended to prevent the defendants from preferring other persons to the plaintiffs. I quite agree that I did go on to say I thought that they should distribute their assets, as they got them in, in paying rateably the creditors whom I treated on this assumption as being all entitled to be paid rateably.

But at that time the question of the plaintiffs' right to levy execution had not been debated, and was not considered by me, and it may be that, when it does come to be considered, my intentions to some extent may be qualified, or at any rate cannot be given the full effect which I had in mind. That seems to me, however, to be relatively of little importance. The plaintiffs have recovered judgment, and it seems to me impossible to suggest that on the basis of the order or judgment they ought to be deprived of their rights as judgment creditors, to which, on other grounds and apart from this judgment, they would have been entitled. Therefore, whether the judgment and the order are right or wrong—and that is a matter which may be tested in another court—I reach the

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conclusion that, reading the order as I do in the light of the issues which were tried, there is nothing in it which, when added to the other circumstances which I have already mentioned, would make it just or otherwise right or proper for me to grant a stay of execution. In that state of affairs the answer to the application so far made is that it has failed, with the usual consequences, that the defendants should pay the taxed costs of the plaintiffs.

Application refused.

Solicitors for defendants: *Radcliffes & Co.*

Solicitors for plaintiffs: *Laytons, for Greene & Greene, Bury St. Edmunds.*

H. L. L.

Considered. LANGFORD PROPERTY CO., LTD. *v.* GOLDRICH. [1949] 1 All E.R. 402.

Explained. LANGFORD PROPERTY CO., LTD. *v.* BATTEN. [1949] 2 All E.R. 422.

Approved. LANGFOR PROPERTY CO. LD. BATTEN [1951] A. C. 22

C. A.

1945

Apr. 25.

MacKinnon, Lawrence and Morton L.JJ.

VAUGHAN *v.* SHAW.

Landlord and tenant—Rent restriction—House let in two separate parts—Subsequent letting of whole house—Standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 2—*Rent and Mortgage Interest Restrictions Amendment Act*, 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 16—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *ss.* 1, 7, *sub-s.* 1.

A dwelling-house which was brought within the scope of the Rent Restriction Acts by the Rent and Mortgage Interest Restrictions Act, 1939, was let on September 1, 1939 to two tenants occupying distinct, but not structurally separated, tenements at rents of 17*s.* and 15*s.* 6*d.* a week respectively. In January, 1941, the house was let as a whole to a tenant at 25*s.* a week:—

Held, that the standard rent of the house was 25*s.* a week, being the rent at which it was first let as a whole, and not 32*s.* 6*d.* the aggregate of the rents of the two parts.

APPEAL from Portsmouth county court.

A house at Portsmouth to which the Rent and Mortgage Interest Restrictions Act, 1939, applied was let on September 1, 1939, to two tenants occupying separate parts of it, with no structural separation between the parts, but merely a right to occupy the staircase and entrance in common. The rents of the two parts were respectively 17*s.* and 15*s.* 6*d.* a week. In January, 1941, the house was let as a whole to the defendant at 25*s.* a week. On a subsequent application by the landlord to fix the standard rent, the county court judge held that the standard rent was 32*s.* 6*d.*, being the aggregate of the rents at which the parts were let on September 1, 1945. The tenant, who claimed that the standard rent was 25*s.*, being the rent at which the whole house was first let, appealed.

The relevant statutory provisions are set out in the judgments, from which the arguments also sufficiently appear.

Heathcote-Williams for the tenant.
Stewart Horner for the landlord.

MacKinnon L.J. This is yet another almost insoluble problem arising from that welter of chaotic verbiage which may be cited together as the Rent and Mortgage Restrictions Acts, 1920 to 1939. We have had our attention called to a great number of passages in this obscure mass of words, and it is obvious that this is an extremely obscure and difficult point. But the county court judge, I think, was misled by an erroneous belief that s. 12, sub-s. 2, of the Act of 1920 no longer applied, since it is not incorporated as part of the Act of 1939. That sub-section provides: " This Act shall apply " to a house or a part of a house let as a separate dwelling." He relied on the omission of that provision as a direction to take into account the fact that this house had been let as two separate parts, and to take the aggregate of the rents for those parts in order to find the standard rent under the Act of 1939. That seems to me to overlook the provision in s. 7, sub-s. 1, which is the definition section of that Act, and which provides: " Other expressions have the same meaning " as in the Rent and Mortgage Interest Restrictions (Amend- " ment) Act, 1933." Turning back, one finds that in s. 16, the interpretation section of the Act of 1933, the definition of " dwelling-house " is: " ' Dwelling-house ' has the same " meaning as in the principal Acts, that is to say, a house let " as a separate dwelling or a part of a house being a part " so let." Therefore, though s. 12, sub-s. 2, of the Act of 1920 does not apply under the Act of 1939, an exactly equivalent definition of dwelling-house is made to apply by the incorporation of s. 16 of the Act of 1933.

That being so, it seems to me that the learned judge was wrong—very venially wrong, because anybody may be forgiven for making a mistake about this series of Acts. But it seems to me that he did fall into an error in considering the question whether he was bound to ascertain the standard rent of this whole house as a separate dwelling-house. On that question I think the tenant was right in saying that it was let for the first time as a separate dwelling when it was let to him in January, 1941, at 25*s.* a week. Therefore the standard rent ought to have been held to be 25*s.* and not 32*s.* 6*d.*, the total of the two rents paid for the two parts of the house under the previous letting. In the result I think the appeal succeeds, and must be allowed with costs.

LAWRENCE L.J. I agree. I think that the case turns in the final analysis on the definition of standard rent in s. 12, sub-s. 1 (*a*), of the Act of 1920, as applied by the later Act. The dwelling-house in this case was the whole of these premises. The whole of the premises was not let as a separate dwelling-house on September 1, 1939. It was first let afterwards, and was then let at 25*s.* a week. Therefore, within the express terms of the definition of standard rent, that rent at which it was first let as a whole dwelling-house must be the standard rent. It appears to me also that the decision which my Lord has proposed is in accordance with the case of *Veale* v. *Cabezas* (1), which has stood for twenty-four years. Although the point, as Mr. Horner has pointed out, probably was not fully argued in that case, yet the decision of the Divisional Court was in terms in accordance with the decision which we have now come to. For these reasons, I agree with what my Lord has proposed.

MORTON L.J. I also agree, but as we are differing from the county court judge I think I ought to state as shortly as I can the chain of reasoning by which I have arrived at that result, even if it means plunging for a short time into the Acts which have already been described in such unflattering terms.

The problem which the judge had to solve was: What was the standard rent of this house? To ascertain that, he had to consider s. 12, sub-s. 1 (*a*), of the Act of 1920 in its application to a house which was only first controlled by the Act of 1939. He had to consider this problem in the light of the joint effect of those two Acts.

The relevant definition is as follows: "The expression "'standard rent' means the rent at which the dwelling "house was let on September 1, 1939, or . . . . in the case "of a dwelling house which was first let after the said

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(1) [1921] W. N. 311.

"September 1, the rent at which it was first let." This house was brought under control by virtue of s. 3, sub-s. 1, of the Act of 1939, which, as far as is material, reads as follows: "Without prejudice to the operation of the two preceding "sections in relation to any dwelling house to which the "principal Acts applied immediately before the commencement "of this Act, the principal Acts, as amended by the last "preceding section, shall, subject to the provisions of this "section, apply to every other dwelling house of which the "rateable value on the appropriate day did not exceed" so much; and then the figures are set out. The Act is to apply to "every other dwelling house," and one must look and see what is the definition, if any, of a dwelling house in the Act of 1939. For that purpose one has to turn to s. 7, sub-s. 1, where certain expressions are defined. The sub-section concludes: "Other expressions have the same meanings as in the Rent and "Mortgage Interest Restrictions (Amendment) Act, 1933." One must therefore pursue the matter back to the Act of 1933. This, I think, is a stage which the county court judge did not reach, because it would appear from his judgment that his attention cannot have been directed to s. 7, sub-s. 1, of the Act of 1939. Turning back to the Act of 1933, one finds in s. 16, the following definition of dwelling house: "'Dwelling house' "has the same meaning as in the principal Acts, that is to say, "a house let as a separate dwelling, or a part of a house being "a part so let."

Having traced the matter so far I must now consider: Was this a dwelling house which was let on September 1, 1939, or was it a dwelling house which was first let after September 1, 1939? In my view, having regard to the definition of a dwelling house, it must be treated for these purposes as a dwelling house which was first let after September 1, 1939. Up to that date there was no letting of this dwelling house by itself. There was a letting of two separate parts of it. I do not think that that is a letting of the house "as a separate "dwelling" within the meaning of the Acts. The learned judge in his judgment said: "The principal Acts are accordingly to be "made to apply to this house simply because the rateable value "does not exceed 75*l*. independently of the question whether it was on the appropriate day let as a separate dwelling." With all respect, I think that is a misconception on his part which arises from the fact that his attention was not directed to the definition of "dwelling house" contained in the Act of 1939

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by reference to the Act of 1933. I think it was necessary for him to consider whether the house was on the appropriate day let as a separate dwelling. In my opinion, it was not. It was not let as a separate dwelling until January 13, 1941.

I agree with the order proposed by my Lord, and I agree that the decision at which we have arrived is in accordance with the case of *Veale* v. *Cabezas* (1). I should like to add, in order to show that one particular point has not been overlooked, that there was an argument before us as to whether s. 5 of the Act of 1938 applied to this case, and what the position will be if and when this house, which is at present let as a whole, is subsequently let again in two parts. I wish to make it clear that, although I have not overlooked that point, I do not think it is necessary to decide it on the present occasion. The case is difficult enough as it stands, without importing into it questions which may never arise.

Appeal allowed.

Solicitors for tenant: *Amphlett & Co., for Stokes & Medcalfe, Portsmouth.*

Solicitors for landlord: *Gordon Gardiner, Kearton & Co., for J. R. C. Miller, Portsmouth.*

J. W. H.

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(1) [1921] W. N. 311.

C. A.
1945
Apr. 18;
May 1.
MacKinnon, Lawrence and Morton L.JJ.

In re AFFAIRS OF ALSOP.

Emergency legislation—Liabilities adjustment—Order allowing debtor to remain in possession of property—Order extending beyond end of lease—Action for recovery of possession—Effect of protection order—Refusal of leave to proceed—Discretion—Liabilities (War-Time Adjustment) Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *ss.* 3, *sub-s.* 2; 6, *sub-s.* 1*—Liabilities (War-Time Adjustment) Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 40), *ss.* 6, *sub-s.* 1; 21.

The debtor had been tenant of a barn from the appellant, but his tenancy had been duly determined by notice to quit, and at the material time he had become a trespasser. The appellant issued a specially indorsed writ, claiming possession, arrears of rent down to the end of the tenancy, and mesne profits thereafter. The debtor obtained a protection order under s. 3, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, and the county court judge made an interim adjustment order containing the following paragraph: "The question of possession of the barn "held by the debtor as tenant of C. is deferred, the debtor mean-"while paying to the said C. 35*s*. per month . . . . the debtor "on his part undertaking to find other accommodation for his "goods and chattels therein, and to give up possession of the said "barn as early as possible":—

Held, that there was no power to make an order permitting the debtor to remain in possession after he became a trespasser, and that the definition of "tenant" in s. 21 of the Liabilities (War-Time Adjustment) Act, 1944, must be limited to persons lawfully remaining in possession of premises after the termination of a lease or tenancy, e.g., under the Rent and Mortgage Interest Restrictions Acts.

Held, further, that the appellant's action was "for the recovery "of possession of land" within the meaning of s. 3, sub-s. 2, of the Act of 1941, and was therefore stayed by the protection order, but that where the defendant, as in this case, was a trespasser, a refusal of leave to proceed would be an improper exercise of discretion, and the appellant was entitled to unconditional leave.

In re Affairs of Kirby [1944] K. B. 213 applied; but dicta of Goddard L.J. as to the meaning of "proceedings for the recovery "of possession of land" disapproved and not followed.

APPEAL from Brighton county court.

On December 4, 1939, the appellant, Edward Henry Colman, let to the debtor, Henry Leslie Alsop, a barn at Lancing on a monthly tenancy at 35*s*. a week, payable in advance. The barn was used by the debtor for the purpose of storing certain vehicles and other articles. The debtor paid the rent up to the autumn of 1940, but from that time he paid no rent, and on September 11, 1944, the appellant gave the debtor notice to quit, expiring on November 4, 1944. The debtor failed to give up possession, and, since his possession was not protected by the Rent Restriction Acts, or the Courts (Emergency Powers) Acts, he became a trespasser as from November 4, 1944. On November 17, 1944, the appellant issued a specially indorsed writ, claiming possession of the barn, 84*l*. arrears of rent, and mesne profits thereafter at the rate of 35*s*. a month till delivery of possession.

Before that action came on for hearing, the debtor, on December 4, 1944, applied for and obtained ex parte in the county court a protection order under s. 3, sub-s. 2, of the

Liabilities (War-Time Adjustment) Act, 1941 (1). After investigation by the liabilities adjustment officer, the county court judge on March 1, 1945, made an adjustment order, of which the following paragraph only was material. "The "question of possession of the barn at Lancing held by the "debtor as tenant (*sic*) of Edward William Colman is deferred, "the debtor meanwhile paying to the said Edward William "Colman 35*s*. per month from the date of the protection order, "namely, December 4, 1944, payable monthly, the first three "months up to March 4, 1945, to be paid within fourteen days "of the date of this order, the debtor on his part undertaking to "find other accommodation for his goods and chattels therein "and to give up possession of the said barn as early as possible."

Against that order the appellant appealed.

Geoffrey Lawrence for the appellant. The county court judge had no jurisdiction to make an order whereby the debtor, whose lease has expired by effluxion of time, is continued in possession of the appellant's property, though he is a mere trespasser. That was decided in this court in *In re Affairs of Kirby* (2), which would be indistinguishable from this case, but for the provisions of the Liabilities (War-Time Adjustment) Act of 1944, which has defined "tenant" in a way which upsets every notion of tenancy and rent that one has ever heard of. Even so, the only order which the judge could make was an order giving the appellant leave to proceed with his action. Either it was not stayed at all, under s. 3, sub-s. 2, of the Act of 1941, or it was in the category where the court *must* give leave to proceed, and where any other order is an improper exercise of discretion. For the former proposition I rely on the dicta of Goddard L.J. in *Kirby's* case (3).

Neither the debtor nor the liabilities adjustment officer was represented.

Cur. adv. vult.

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(1) The Liabilities (War-Time Adjustment) Act, 1941, s. 3, sub-s. 2, provides that in certain circumstances the court may make an order to be known as a "protection order," and further provides: "While any such order "is in force,—(*a*) any proceedings "against the debtor . . . . for "the recovery of possession of "land or of goods let under a "hire-purchase agreement shall "be stayed, and shall not be "further prosecuted except with "the leave of the court, and subject to such restrictions and "conditions as it thinks fit."

(2) [1944] K. B. 213.

(3) Ibid. 223.

May 1. The judgment of the court was read by

MORTON L.J. This appeal raises questions of some importance as to the construction of the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, and the powers of the court thereunder. [After stating the facts, the judgment continued]: It would appear from para. 7 of his order that the judge must have formed two conclusions of law, (1.) that the appellant's action for possession was stayed by reason of s. 3, sub-s. 2, of the Act of 1941, and (2.) that this Act gave the judge power to extend the debtor's occupation of the property, notwithstanding that the debtor had become a trespasser before the protection order was made.

We propose first to consider the second of these two conclusions. Subject to the question of the effect of the Liabilities (War-Time Adjustment) Act, 1944, which we shall discuss later, we think the judge was wrong in this conclusion, having regard to the decision of this court in *In re Affairs of Kirby* (1). The facts in the last mentioned case differed in certain respects from the facts in the present case, but the court unanimously took the view that the Act of 1941 did not give the county court jurisdiction, when making an adjustment order, to extend the debtor's occupation of property beyond the term of two leases, expiring on March 25, 1943, under which he held the property as tenant. Scott L.J. after referring to s. 3, sub-s. 2, of the Act of 1941, and to s. 6, sub-s. 1, of that Act, said (2): "The result "is that the county court seems, at first sight, to be authorized "to keep a debtor in possession after his contractual right to "possession has ceased even by the expiration of the term of "his lease . . . . I think the county court's order of "March 23, 1943, that the debtor might remain in possession, "was only valid for the two days to March 25, when the leases "came to an end by effluxion of time. From then onwards "the court had no power to allow the debtor to remain in "possession." MacKinnon L.J. expressed his agreement with the judgment of Scott L.J. and also with that of Goddard L.J. (as he then was). Goddard L.J. said (3), in reference to the Act of 1941: "Its title and its whole structure show that its "object is the arrangement, adjustment and settlement of the "affairs of persons financially affected by the war. Financial

(1) [1944] K. B. 213.
(2) Ibid. 219.
(3) Ibid. 223.

"embarrassment cannot by any process of thought be said to "have any relation to trespass on another's property, even "where the trespass is the failure or refusal to go out on the "expiration of a term of years . . . . The words in s. 3, "sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, "'for the recovery of possession of land' are immediately "followed by 'or of goods let under a hire-purchase agreement,' "and this seems to me strongly to point to the fact that what "the legislature had in mind was recovery of possession of land "for non-payment of rent. In respect of goods there is no "prohibition against bringing an ordinary action of detinue. "What is prohibited is the recovery of goods under a hire-"purchase agreement where the right to recover the goods "usually, though admittedly not invariably, arises owing to "the non-payment of money. Otherwise a financially "embarrassed squatter could hold up proceedings taken "against him by a dispossessed owner, at least temporarily, "by going to the court ex parte and making out a case that his "financial troubles were caused by the war and getting a "protection order, which would stay the action of trespass. "Even if the section does effect a stay of proceedings against "one who is a trespasser, in my opinion the court, when making "an adjustment order, has no jurisdiction to extend the debtor's "occupation of the property beyond the terms of the lease. "It follows that the court ought not to have protected the "debtor beyond March 25, 1943." It will be observed that Goddard L.J. was inclined to think that the words in s. 3, sub-s. 2 (*a*), of the Act of 1941, "any proceedings against "the debtor for the recovery of possession of land," refer only to proceedings against the debtor for the recovery of possession of land for non-payment of rent. We return later to this tentative expression of opinion, which was in our view obiter. Whether or not it was well-founded, there is here a clear decision by all three members of this court that the county court judge, when making an adjustment order, has no jurisdiction to extend the debtor's occupation of property beyond the term of his lease. It seems to us that this decision applies equally to the present case, although here the debtor's occupation was not under a lease but under a monthly tenancy which had been duly determined by notice before the date of the protection order.

This being the position apart from the provisions of the Act of 1944, we must consider whether that Act effected an alteration in the law as stated by this court in the case just cited. The Act of 1944 is entitled " An Act to provide for the adjust-" ment and settlement of debts and liabilities arising in certain " areas and to amend the Liabilities (War-Time Adjustment) " Act, 1941." The only sections to which we have been referred as having any bearing on the present case are s. 6 and the definition of " tenant " in s. 21. Section 6 substitutes a new sub-section for sub-s. 1 of s. 6 of the Act of 1941, and that new sub-section begins : " Where at the date of the protection order " the debtor is the tenant of any premises, the court may in the " liabilities adjustment order provide that, in respect of any " period whether before or after the making of the order, the " debtor shall be wholly or partly relieved from the payment " of rent." Then follow certain provisions which we need not read, and the sub-section ends : " Where the court grants relief " under this section in respect of a period after the making of " the order, it may define the period either by specifying it or by " directing that the relief shall continue until a further applica-" tion is made." Sub-section 3 of s. 6 of the Act of 1944 is as follows : " The court in the liabilities adjustment order may " provide for the postponement of payment by the debtor of " any sum which has or will become payable by the debtor in " respect of rent, whether or not the court has reduced the rent."

So far, and apart from the effect of s. 21, it would seem clear that s. 6 in no way confers a power on the county court to extend a debtor's occupation of property after his tenancy has expired or has been duly determined by notice. The section refers throughout, both in the sub-sections which we have quoted and in other sub-sections, to orders which may be made by the court in regard to " rent." This reference seems quite inconsistent with the view that the section extends to cover a case where the debtor has become a trespasser and has no right to be occupying the premises at the date of the protection order. Section 21, however, provides as follows : " In this Act the " following expressions have the meanings hereby respectively " assigned to them, that is to say (inter alia) : 'Tenant' " includes a person retaining possession of any premises after " the termination of a lease or tenancy." At first sight it would appear that this definition would include a person who retained possession of premises as a trespasser, but we have come to the conclusion, after a careful study of the Act of 1944, and of the Act of 1941 which it amends, that it would not be right to give so wide a meaning to the definition. If, for instance, one tries to apply s. 6 to the case of a trespasser, difficulties arise at once; the references to "rent" in that section are quite inappropriate as applied to the position of a trespasser, and it seems to us most unlikely that the Act could have been intended to confer a power on the county court, under s. 6, sub-s. 1, to allow a trespasser to remain in possession and even to relieve him from making any payment to the owner of the land. It is to be observed that s. 6, sub-s. 1, of the Act of 1941 was limited in its application to cases where, at the date of the protection order, the debtor was "in possession of any premises held on a lease or tenancy, or "was holding over any premises, after the determination of a "lease or tenancy, by virtue of the Rent and Mortgage Interest "Restrictions Acts, 1920 to 1939, or the Courts (Emergency "Powers) Acts, 1939 and 1940." Even in these cases the court was only given power to *reduce* the rent. Further, it is to be assumed that the legislature was aware of the decision of this court in *In re the Affairs of Kirby* (1). If it had been intended to give the court power to confirm in his possession of premises a person who had become a mere trespasser, and a power to relieve such a person from the payment of any rent, we feel confident that powers so remarkable would have been conferred in plain terms. By s. 22 of the Liabilities (War-Time Adjustment) Act, 1944, that Act and the Act of 1941 are to be construed as one. We think it would be contrary to the scheme and intention of this piece of legislation to hold that such a power as we have just described is imported, as it were, by a "side wind," by the joint effect of s. 6 and the definition of "tenant" in the Act of 1944. Reading the two Acts as a whole, we think it is necessary to read the definition of "tenant" in s. 21 as including only persons lawfully retaining possession of any premises after the determination of a lease or tenancy, e.g., by virtue of the Rent and Mortgage Interest Restrictions Acts or the Courts (Emergency Powers) Acts. The result is that the county court judge exceeded his powers in directing, in effect, that the debtor was to be at liberty to remain in possession of the barn on the terms set out in para. 7 of his order.

We must now consider (*a*) whether the appellant's action for possession was stayed by reason of s. 3, sub-s. 2 (*a*), of the Act of 1941, and if so, (*b*) whether the county court judge's refusal to allow that action to proceed could be regarded as a proper exercise of his discretion, on the facts of this case.

Question (*a*) must be answered in the negative, if we accept as correct the suggestion of Goddard L.J. in *Kirby's* case (1), that the words "any proceedings against the debtor for the "recovery of possession of land" ought to be construed as referring only to proceedings against the debtor for the recovery of possession of land for non-payment of rent. We do not think that Goddard L.J. expressed a concluded opinion on the point, but even if his observations are to be so construed, they were clearly obiter dicta. We have studied all the judgments in *Kirby's* case (1) with care and with respect, and we find ourselves unable to agree with the suggestion of Goddard L.J. The words used in s. 3, sub-s. 2 (*a*), of the Act of 1941, in their ordinary meaning, apply to all actions for the recovery of possession of land, and we can find nothing in the context, or in the general scheme of the Act, which leads us to the conclusion that they must be given a more limited meaning. As to the context, the words in question are followed by the words "or of "goods let under a hire-purchase agreement." The express limitation, in the case of goods, to goods let under a hire-purchase agreement seems to us to indicate, by way of contrast, that there is no limitation in the case of actions for the recovery of land and that all such actions come within the scope of the sub-section. As to the scheme of the Act, it seems to us quite natural that all actions for the recovery of possession of land should be stayed, as a temporary measure, when the court makes a protection order, whether such actions are based on non-payment of rent, or on breach of a covenant to keep in repair, or on a notice to quit or on any other ground. The object is, we think, to give a "breathing-space" to the debtor, and to the judge who is considering the case. We have carefully borne in mind the observation of Goddard L.J. (1) that if the sub-section were given this construction "a financially embar-"rassed squatter could hold up proceedings taken against him "by a dispossessed owner, at least temporarily, by going to the "court ex parte and making out a case that his financial "troubles were caused by the war and getting a protection "order, which would stay the action of trespass." That is true, but it seems to us an unavoidable result of the provisions of the sub-section. When the application for a protection order first comes before the county court judge he may not be fully acquainted with the facts as to pending actions. All that the debtor has to do, on such an application, is to make out a prima facie case as to certain matters which are specified in s. 3, sub-s. 1, of the Act of 1941. Even if the judge were informed

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(1) [1944] K. B. 213.

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(1) [1944] K. B. 223.

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Affairs of Alsop, *In re.*

that an action for possession was pending, it must be borne in mind that a plaintiff might have issued a writ, and delivered a statement of claim, on the footing that the debtor was a trespasser, whereas investigation might reveal that the tenancy was never lawfully determined, or that the debtor was protected by the Rent and Mortgage Interest Restrictions Acts. This being so, it seems to us not at all unreasonable that all proceedings for the recovery of possession of land should be stayed for the time being, so that the whole position can be investigated.

As to question (*b*), it is clear that the county court judge refused leave for the appellant to proceed with his action. It is equally clear, from the concluding words of para. 7 of his order, and from the judge's own report of the proceedings, that he was fully aware of the facts, as set out earlier in this judgment. In our view the judge, not having *Kirby's* case (1) in his mind, must have thought that he had power to confirm a trespasser in his occupation of land. It is not surprising that, on this footing, he refused to allow the appellant to proceed with his action. He hoped that the debtor would very shortly deliver up possession peacefully to the appellant, and he made provision for the payment of rent from December 4, 1944, to March 4, 1945. If the judge had realized that he had no such power, he would surely have given leave to the appellant to proceed with his action. Any other exercise of the judge's discretion to grant or refuse such leave would clearly have been improper, as it would have been an endeavour to use his discretion for the purpose of extending the debtor's occupation of the barn beyond the duration of his tenancy agreement, in defiance of the decision of this court in *Kirby's* case (1). We feel sure that the judge had no such intention.

It follows that the course taken by the judge in refusing leave for the appellant to proceed with his action was not a proper exercise of his discretion under s. 3, sub-s. 2 (*a*), of the Act of 1941, as there were no grounds on which he could properly refuse such leave. In our judgment this appeal succeeds; the order contained in para. 7 of the order of March 1, 1945, should be set aside, and the appellant should be granted unconditional leave to proceed with his action for possession.

Appeal allowed.

Solicitors for appellant: *Capel Cure, Glynn Barton & Co., for F. J. P. Veale, Brighton.*

J. W. H.

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(1) [1944] K. B. 213.

STOODLEY v. H. W. THOMAS AND SONS, LIMITED AND ANOTHER.

1945

May 1.

Atkinson, Wrottesley and Tucker JJ.

Sale of goods — Milk — False trade description — Application of — Description in milk account book—Quantity of milk delivered less than that stated in book—Account book delivered to purchaser fortnight after delivery of milk—Merchandise Marks Act, 1887 (50 & 51 *Vict., c.* 28), *s.* 2, *sub-s.* 2.

By s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, " Every " person who sells . . . . any goods or things to which any . . . . " false trade description is applied . . . . shall . . . . be guilty " of an offence against this Act."

Milk retailers had a standing order to deliver sixteen quarts of milk each day to a purchaser. On four days in May the amount of milk delivered to the purchaser was less than sixteen quarts, but the milk retailers entered the amount of sixteen quarts on each of these days in a milk account book. This account book was delivered to the purchaser in June about a fortnight after the delivery of the milk, and the purchaser paid the milk retailer the amount stated in the book as being due from him. Upon a prosecution of the milk retailer for the sale of milk to which a false trade description had been applied :—

Held, that it was impossible to say that there had been a sale of milk on the four days in May to which a false trade description had been applied at the time of sale, merely because at some time subsequent to the delivery of the milk an account book had been delivered to the purchaser in which the quantity of milk delivered on those four days had been over-stated.

CASE stated by an alderman of the City of London sitting as a court of summary jurisdiction.

At a court of summary jurisdiction sitting at the Mansion House eight informations were preferred by the appellant, George Theodore Stoodley, chief inspector of weights and measures of the Corporation of the City of London, against the respondents. Four informations under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, were against the respondent company, H. D. Thomas & Sons, Ld., for having on May 23, 24, 25 and 26, 1944, unlawfully sold, and four informations under the same section, as made applicable by s. 5 of the Summary Jurisdiction Act, 1848, were against the respondent, George Cooksey, for having on the same dates unlawfully aided, abetted, counselled and procured the respondent company to commit the offence of selling, at 68 King William Street in the City of London, certain goods, namely, milk, to which a false trade description was applied.

Upon the hearing of the informations on August 9 and 14, 1944, the following facts were proved or admitted. (*a*) The respondent company were in the month of May, 1944, sellers of milk to customers in the City of London. (*b*) In the said month one such customer was the Guardian Assurance Co., Ld., of 68 King William Street, hereinafter called " the purchaser." (*c*) The purchaser was during the said month permitted by the Food Office to purchase sixteen quarts of milk per day, and the purchaser had given a standing order to the respondent company for the sale and delivery during the said month of sixteen quarts of milk per day unless the purchaser should notify the respondent company that a different amount was required on any day. (*d*) The respondent Cooksey was during the said month employed by the respondent company as a milk roundsman. (*e*) The practice upon the sale of milk by the respondent company to the purchaser was as follows:—(i.) The respondent Cooksey delivered milk daily on behalf of the respondent company to the purchaser's premises. (ii.) The respondent company kept a milk account book in which they set a figure against each day which purported to record the quantity of milk delivered to the purchaser on each day. (iii.) At monthly intervals the respondent company presented to the purchaser the said account book purporting to show the daily amounts of milk delivered to the purchaser. (iv.) Upon the presentation of the said account book the purchaser paid the amount claimed by the said account book as being due to the respondent company. (*f*) On or shortly before June 6, 1944, the respondent company presented the said account book to the purchaser in order to obtain payment from the purchaser for milk purported to have been delivered by the respondent company to the purchaser in the preceding month. On June 6, 1944, the purchaser paid to the respondent company the amount claimed by the said account book to be due from the purchaser to the respondent company. (*g*) On neither of the days, May 23, 24, 25 and 26, 1944, was any statement as to the quantity of milk delivered given to the purchaser in writing, or orally, or in any manner. No such statement or any other statement which could constitute a trade description was given to the purchaser until the presentation of the account book in June. (*h*) In the said account book when presented to the purchaser for payment there was set out against each of the dates, May 23, 24, 25 and 26, 1944, the figure sixteen, and the price charged therefor was 3*l*. (*i*) The said figure sixteen meant and was understood to mean sixteen quarts, and at the said date the price of milk was 9*d*. per quart. (*j*) On May 23, 1944, the quantity of milk in fact delivered by the respondent Cooksey on behalf of the respondent company to the purchaser was in quantity less than sixteen quarts, being fourteen quarts, thirty-four fluid ounces. (*k*) On May 24, 1944, the quantity of milk in fact delivered to the purchaser was fifteen quarts, three fluid ounces. (*l*) On May 25, 1944, the quantity of milk in fact delivered to the purchaser was fourteen quarts thirty fluid ounces. (*m*) On May 26, 1944, the quantity of milk in fact delivered to the purchaser was fourteen quarts thirty fluid ounces. (*n*) The entries in the milk account book for May 23, 24, 25 and 26, 1944, were false, and if such entries constituted trade descriptions within the aforesaid Act, they were false trade descriptions.

At the close of the case for the prosecution the solicitor for the respondent company, without calling any evidence, submitted that there was no case to answer. It was contended on behalf of the respondent company (*a*) that at the time when the milk account book was presented to the purchaser, on or shortly before June 6, 1944, the goods, that is to say, the milk delivered on May 23, 24, 25 and 26, 1944, had been consumed and no longer existed; (*b*) that a trade description within the meaning of the aforesaid Act could not be said to be applied to goods that no longer existed; (*c*) that a description of goods in an invoice or account book could not be applied to the goods within the meaning of the aforesaid Act unless such invoice or account book were delivered contemporaneously with the goods.

On behalf of the appellant, it was contended (*a*) that each of the entries in the milk account book for May 23, 24, 25 and 26, 1944, was a trade description within the meaning of the aforesaid Act; (*b*) that the trade descriptions were calculated to and in fact did lead the purchaser to believe that the goods in connexion with which they were used, namely, the milk delivered to the purchaser on May 23, 24, 25 and 26, 1944, was of the quantity of sixteen quarts on each of the aforesaid days; (*c*) that the purchaser was deceived by the said trade description into paying for more milk than he in fact received; (*d*) that even if the trade description was not applied to the goods until after they were consumed nevertheless by the said entries in the milk account book the respondent company as sellers applied a trade description to the said goods.

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The alderman was of opinion (1.) that to constitute the offence under this section of selling goods to which a false trade description was applied, the false trade description must be applied to the goods at a time when it could operate on the mind of the purchaser so as to be calculated to induce him to accept the goods as being true to the description; (2.) that a false trade description referring to the goods in an account given to the purchaser several days after sale and delivery and acceptance of the goods did not make the sale a selling of goods to which a false description was applied. The alderman was further of opinion that as the false trade description in this case was not applied to the goods until several days after the offences were alleged to have been committed, and as the offences were alleged to have been committed on May 23, 24, 25 and 26, 1944, and as on those dates no false trade description was or had been applied to the goods, the respondent company could not be convicted of selling on those dates goods to which a false trade description was applied, nor the respondent Cooksey of aiding and abetting in the commission of the said offences. He accordingly dismissed the informations.

The question for the opinion of the court was whether on the above statement of facts the alderman came to a correct determination and decision in point of law.

Arthian Davies and *John Thompson* for the appellant. The entries in the milk account book are evidence that on the specified days in May a trade description was applied to these goods which was false: see *Budd* v. *Lucas* (1). It also affords some evidence that the entries were made on the specified days to which they related. It is not necessary that the trade description should be applied to the goods before the sale takes place. It is sufficient if they are applied at the time of or immediately after the delivery of the goods: *Budd* v. *Lucas* (1). If a description applied to the goods immediately after the delivery is sufficient to make the section apply there is no reason why a trade description applied to the goods some time after delivery would not equally be sufficient. The fact that the goods were not in existence, having been consumed at the time the trade description was applied to them, would not prevent its being an offence within the Act.

The respondents were not represented.

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(1) [1891] 1 Q. B. 408.

ATKINSON J. I have no doubt that the sixteen quarts entered in the milk account book as applied to something less than sixteen quarts would be a false trade description, but the point that was taken, which the alderman who decided the case accepted, was that there was no offence under this sub-section unless the false trade description existed and was applied to the goods at the time of the sales. *Budd* v. *Lucas* (1) and *Coppen* v. *Moore* (*No.* 2) (2) were cited to him. In *Budd* v. *Lucas* (1) there was a sale of six casks of beer, and the beer having been delivered by the drayman into the appellant's cellar the drayman at the same time left at the appellant's house an invoice which described the casks as six barrels. It was proved that a barrel meant in the trade something that contained thirty-six gallons, and that these casks did not contain thirty-six gallons so there was plainly a false trade description. The point taken in that case was that the description was not physically attached to the goods sold and that therefore it could not be said that the false trade description was applied to the goods sold. The Divisional Court, however, rejected that contention. Pollock B. said (3): "No doubt, the description must be used "in connexion with goods; but I think we should be cutting "down the intention of the Act if we were to hold that the "delivery of an invoice or other description of goods, at the "time of, or immediately after, the delivery of the goods themselves, was not a use in connexion with the goods within the "meaning of the section." Charles J. said (4): "To the question "whether the delivery of the invoice along with the casks was "an application of a false trade description within the meaning "of the Act, we cannot, in the present state of the case, give a "categorical answer. All that we can say is, that it may have "constituted the offence with which the respondent is charged. "No doubt there was not any physical application of a trade "description to the goods; but I do not think that that is "necessary. To my mind, it is clear from the language of "s. 5, sub-s. 1 (*d*), that something more is contemplated than an "actual physical connexion, and if so, then I think the delivery "of the invoice with the goods might be a use of a false trade "description of the goods delivered." *Coppen* v. *Moore* (*No.* 2) (2) threw no further light on the point, though I think it was a stronger case. A man went into a shop to buy Scotch ham and was told that certain articles in the shop were Scotch ham; so he said he would have one, and one was wrapped up and he was given an invoice which had not the words "Scotch "ham" on it. The invoice was handed back for completion and the words "Scotch ham" were written in, and having got that the man paid for it. It was all done at one and the same time, and the court, following *Budd* v. *Lucas* (1), had no difficulty in holding that in order to constitute the offence it was not necessary that there should be any physical connexion between the false trade description and the goods to which it was applied, and that an offence against the Act had been committed.

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(1) [1891] 1 Q. B. 408.

(2) [1898] 2 Q. B. 306.

(3) [1891] 1 Q. B. 412.

(4) Ibid. 412.

To my mind it is impossible to say that on any of these four days in May there was a sale of goods to which a false description was applied. It seems to me it is quite impossible to say, because ten days or a fortnight later the quantity of goods was overstated in an invoice, that that false trade description was applied in any sense at the time of the sale. In my judgment the alderman took the right view, and the appeal fails.

WROTTESLEY J. I agree. In particular I agree with what the alderman said in expressing his opinion. He said he was of opinion "that a false trade description referring to the goods in "an account given to the purchaser several days after sale and "delivery and acceptance of the goods did not make the sale a "selling of goods to which a false description was applied." There are doubtless discreditable transactions, such as the supplying of short measure of milk, which would not be covered by the section in question. There are also thousands of dishonest transactions which it will cover. I think on this occasion the alderman came to a right conclusion.

TUCKER J. I agree and have nothing to add.

Appeal dismissed.

Solicitor for appellant: *The City Solicitor.*

(1) [1891] 1 Q. B. 408.

R. F. S.

REX *v.* JOHNSON.

C. C. A.

1945

Apr. 23.

Singleton, Wrottesley and Tucker JJ.

Criminal law—Prevention of crimes—Charge—Found in public places, X. street and Y. street, waiting for opportunity to commit an offence—X. street leading into Y. street—Duplicity—Accused not embarrassed—Evidence of waiting for opportunity and then of offence attempted—Prevention of Crimes Act, 1871 (34 *&* 35 *Vict., c.* 112), *s.* 7*—Criminal Appeal Act,* 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

The appellant was charged in one count of an indictment, under s. 7 of the Prevention of Crimes Act, 1871, that after two previous convictions of a crime as stated and within the time stated in the section, " he was found in certain public places, namely, Elm Tree " Road and Circus Road, in the county of London, waiting for an " opportunity to commit an offence punishable on indictment, " namely, housebreaking, with intent to steal." Elm Tree Road led directly into Circus Road. The evidence for the prosecution showed that the appellant not only waited to commit the offence of housebreaking, but then attempted to commit it :—

Held, that the court was not satisfied that the charge was bad for duplicity, but that if it had been, since the appellant was not embarrassed or prejudiced by the presentment of the indictment in this form, the court, following *Rex* v. *Thompson* [1914] 2 K. B. 99, would have acted under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and dismissed the appeal, since there had been no substantial miscarriage of justice.

Held, further, that the fact that the appellant had gone beyond the stage of waiting for an opportunity to commit the crime of housebreaking, and had attempted to commit it, did not prevent his indictment and conviction for the crime under s. 7.

Per curiam :—Those responsible for settling indictments should follow the words of the statute creating an offence. Further, the attention of prosecuting authorities should again be directed to the words of Humphreys J., in *Rex* v. *Goodwin* [1944] K. B. 518, that if the facts of a case afforded evidence, not only of an offence under s. 7 of the Prevention of Crimes Act, 1871, but also of another offence which did not involve giving proof of the bad character of the accused person, it was more satisfactory that he should be charged with that other offence. The intention was that that direction should be followed.

APPEAL against conviction.

The appellant and a man named McFarlane were convicted on January 30, 1945, at the London Sessions, on an indictment charging in one count that McFarlane on October 4, 1938, was convicted of a crime, a previous conviction of a crime being then proved against him, and that the appellant, Johnson, on July 28, 1941, was convicted of a crime, a previous conviction of a crime being then proved against him, and that they

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both within seven years immediately after the expiration of the sentences passed upon them respectively for the last of such respective crimes, namely, on December 28, 1944, were found, in certain public places, namely Elm Tree Road and Circus Road, in the county of London, waiting for an opportunity to commit an offence, punishable on indictment, namely, housebreaking, with intent to steal, contrary to s. 7 of the Prevention of Crimes Act, 1871 (1).

At the trial, the convictions charged having been proved against the accused, Detective Thomson gave evidence that he was in plain clothes about 4 p.m. on December 28, 1944, in Grove End Road, N.W., and that he watched the appellant and McFarlane turn into a block of flats in Elm Tree Road and go upstairs. He said that he listened and he heard the rattle of keys, followed by footsteps coming down a few moments later, so he hid and then he followed the men a little along the road to No. 41, Elm Tree Road, where he saw the appellant fumbling at the lock of the front door of that house. The officer added that a little later they came out again and went into another block of flats in Circus Road, so he spoke to a police sergeant, who was in uniform. As he was so doing, the appellant and McFarlane came out and turned towards them, but when they saw the uniformed officer they hurried in the opposite direction, away from the officers. They broke into a run, then hailed a taxi-cab and got into it, but the officers joined them before the taxi-cab moved off. After a conversation the appellant said: "All right, guv., we've had it." He had in his pocket twelve skeleton keys, a piece of celluloid, and some gloves. McFarlane had some more keys, including two skeleton keys, and two pairs of gloves and an odd glove. The officer who had followed the accused did not know them at the time. The evidence of the uniformed sergeant followed and the case for the prosecution was closed. It appeared that Elm Tree Road led directly into Circus Road. Counsel appearing for McFarlane then submitted that the indictment was bad because it alleged two separate offences in one count. The chairman said that he did not think that there was anything in the point raised. Neither of the accused gave evidence, and in concluding his summing up to the jury the chairman said: "If you have any doubt about it, that these people "were waiting for an opportunity to commit the offence of "housebreaking, if you have any doubt at all that a person who "stands in a door trying a number of keys in the lock in order "to try and break into a house is waiting for an opportunity "to break into the house if the keys will fit, then, of course, "they are entitled to be acquitted. If you have no doubt "about it whatever, it is equally your duty to convict." The accused were convicted and each received a sentence of twelve months' imprisonment with hard labour. The appellant, having obtained leave to appeal, now appealed.

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(1) By Prevention of Crimes Act, 1871, s. 7: "Where any person "is convicted on indictment of "a crime, and a previous conviction of a crime is proved against "him, he shall, at any time within "seven years immediately after "the expiration of the sentence "passed on him for the last of "such crimes, be guilty of an "offence against this Act and be "liable to imprisonment with or "without hard labour for a term "not exceeding one year, under "the following circumstances or "any of them: . . . . Thirdly, if "he is found in any place, "whether public or private, under "such circumstances as to satisfy "the court before whom he is "brought that he . . . . was waiting "for an opportunity to commit "or aid in the commission of any "offence punishable on indictment or summary conviction: . . . ."

The grounds in his notice of appeal were:—(1.) that the indictment was bad for duplicity, in that it alleged two separate offences in one count; (2.) that there was no evidence that the appellant committed the particular offence or offences named in the indictment; and (3.) that the chairman misdirected the jury by directing them to the effect that a person who is engaged in an attempt to commit an offence is at the moment of and during the duration of the attempt waiting for an opportunity to commit the said offence.

Alban Gordon for the appellant. The first ground of appeal is that this indictment was bad for duplicity. The appellant was charged in one count with waiting for the opportunity to commit an offence in one street and also with waiting for the opportunity to commit another similar offence in another street. The count was in very much the same terms as in *Rex* v. *Goodwin* (1), where Humphreys J. commented on the fact that no point had been made that the appellant in that case appeared to have been charged with two offences in one count. The objection was taken in this case at the close of the case for the prosecution. It need not have been taken before plea, on motion to quash the indictment. *Rex* v. *Molloy* (2); *Rex* v. *Wilmot* (3); *Rex* v. *Disney* (4); the observations of

(1) [1944] K. B. 518.

(2) [1921] 2 K. B. 364.

(3) (1933) 24 Cr. App. R. 63.

(4) (1933) 24 Cr. App. R. 49.

Isaacs C.J. in *Rex* v. *Thompson* (1) and Archbold's Criminal Pleading (31st ed.), at p. 47. The second and third grounds of appeal can be taken together. The evidence of the two police officers was that the appellant was found attempting to break into houses with intent to steal: he was not found waiting for an opportunity to commit those offences.

Sir Reginald Blaker for the Crown. There was here no duplicity. The appellant was charged with the one crime of waiting for an opportunity to commit an offence. The fact that the place of waiting is described as being in two places merely specifies the neighbourhood where the appellant waited. He was waiting in Elm Tree Road and Circus Road throughout for the opportunity to commit the offence of housebreaking: see r. 9 of the first schedule to the Indictments Acts, 1915. There was clear evidence that the appellant waited for the opportunity to commit an offence of housebreaking before he actually attempted to commit that offence and, accordingly, he could be charged with this offence under s. 7. There was no misdirection.

SINGLETON J. delivered the judgment of the court. There are three grounds of appeal. The first is that the indictment was bad for duplicity, in that it alleged two separate offences in one count. The usual time for such an objection to be taken is on motion to quash the indictment, before an accused person has pleaded; but as has been stated more than once in this court, this objection can be taken at a later stage. In this case it was taken by counsel for McFarlane, charged with the appellant on this indictment, at the close of the case for the prosecution.

The objection raises a somewhat difficult point. It is highly technical, and it would seem to be a matter for regret, if the appellant were proved to be guilty, that still the indictment would have to be quashed on this ground. Such a result would be still more to be regretted because of what took place in this court only twelve months ago. In April, 1944, this court had before it *Rex* v. *Goodwin* (2), a case in which the indictment was under the same section of the Prevention of Crimes Act, 1871, the main difference being that in that case the material part of the charge was that the appellant was found in a public place, to wit, Portsea Hall and Clifton Court in the county of London, in such circumstances as to satisfy the court before

(1) [1914] 2 K. B. 99, 104.

(2) [1944] K. B. 518.

which he was brought that he was about to commit an offence punishable on indictment, namely, larceny. In the course of his judgment Humphreys J. said (1): "No point was made "at the trial and no point is made on this appeal that the "appellant appears by this indictment to have been charged "with two offences in one count, inasmuch as it is alleged that "he was found at two separate places, in each case under "such circumstances as to satisfy the court before which he "is brought that he was about to commit an offence punishable "on indictment, to wit, larceny." The evidence in *Rex* v. *Goodwin* (2) was that the appellant, who was known to the police, was watched by police officers; that he was seen to go to a block of flats called Portsea Hall, where he went up to the second floor, examined the locks of two of the doorways there, and came down again; that having left Portsea Hall he went to Maida Vale and examined the locks and doors of a block of flats called Clifton Court, and that he was arrested very soon after reaching the street on leaving that block. It would seem from the report of the facts in that case that the two places, Portsea Hall and Clifton Court, were a considerable distance apart and Humphreys J. drew attention to this very point, but notwithstanding that, the indictment in the present case is in the same form in this respect, in that it charges that the appellant was found in certain public places, in the plural, namely, Elm Tree Road and Circus Road, waiting for an opportunity to commit an offence punishable upon indictment. It is to be regretted that attention was not paid, when this indictment was settled, to those words of Humphreys J. If it had been, this point would never have arisen, and time and expense would have been saved. It is clear that Elm Tree Road runs directly into Circus Road. Mr. Alban Gordon's argument on behalf of the appellant is that this indictment is bad in that two offences are contained in one count, and he submits that the words "found in certain public places, namely, Elm "Tree Road and Circus Road," show that there has been charged one offence in Elm Tree Road and another in Circus Road. Having regard to the situation of the two roads, that one runs into or out of the other, we think it very doubtful indeed whether upon the facts of the case that objection taken to this indictment can be held to be good. But over and above that, it is to be remembered that the offence which is charged is that of being found in certain public places waiting for an

(1) [1944] K. B. 521. (2) Ibid. 518.

opportunity to commit an offence. It has been said on behalf of the Crown that all the time while the appellant was seen or found in Elm Tree Road and Circus Road he was waiting for an opportunity to commit an offence: he was found waiting. It matters not, it is submitted, that two places are named, because the offence is that he was found waiting, and it is right to say, so it seems to us, that if the indictment charged the offence as taking place in St. John's Wood or in the neighbourhood of Lord's Cricket Ground, no such objection could have been taken. Rule 9 of the rules contained in the first schedule to the Indictments Act, 1915, provides: "Subject to any "other provisions of these rules, it shall be sufficient to "describe any place, time, thing, matter, act or omission "whatsoever to which it is necessary to refer in any indictment, "in ordinary language in such a manner as to indicate with "reasonable clearness the place, time, thing, matter, act or "omission referred to." I repeat that no objection could have been taken to the indictment if it had charged the offence as having been committed in St. John's Wood or in the neighbourhood of Circus Road, but whoever settled the indictment has preferred to use words of his own without reference either to the terms of the statute creating the offence or to the words of Humphreys J. in *Rex* v. *Goodwin* (1). None the less, we think it right to say that we are not satisfied that this indictment is bad for duplicity. If we were so satisfied, we should still think it right to have regard to the proviso to sub-s. 1 of s. 4 of the Criminal Appeal Act, 1907. In *Rex* v. *Thompson* (2) heard by a full court of five judges, Isaacs C.J., after dealing with the time at which such an objection could or should be taken, said (3): "If we had thought that "any embarrassment or prejudice had been caused to the "appellant by the presentment of the indictment in this "form, we should have felt bound to quash the conviction, "whatever our views might be as to the merits of the "case. It must not be thought that we are deciding that "such objections should not be allowed to prevail either at the "trial or in this court. An indictment so framed might "undoubtedly hamper the defence, and if it did we should give "effect to the objection. There are also other objections to an "indictment which must be held good at any time, as, for "example, an objection on the ground of want of jurisdiction.

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(1) [1944] K. B. 518.
(2) [1914] 2 K. B. 99.
(3) Ibid. 104.

"One of the objects of s. 4 was to prevent the quashing of a "conviction upon a mere technicality which had caused no "embarrassment or prejudice. Whilst giving the right of "appeal upon any wrong decision of any question of law, the "object of the legislature was that justice should be done in "spite of a wrong decision, and that the court should not "interfere if it came to the conclusion that, notwithstanding the "wrong decision, there had been no substantial miscarriage of "justice." Accordingly, in that case the court, finding there had been neither embarrassment nor prejudice, declined to quash the conviction, even though it might be said that the indictment was bad on the face of it. That case has been cited before this court on different occasions, and even if we had been satisfied that this indictment was bad for duplicity, still we should have thought it right in the circumstances of this case to apply the proviso to sub-s. 1 of s. 4, because it is clear that not the slightest embarrassment or prejudice has been caused to the appellant. For these reasons we think that the objection on the ground of duplicity fails.

The second and third grounds in the notice of appeal can be taken together. Mr. Alban Gordon's argument was that the appellant could not be said to have been found waiting to commit an offence, because he was in fact doing something else: that on the evidence he had gone beyond that stage. The evidence of Detective Thomson was that the men went to two or three different places in this immediate area. It would appear that at times one was trying to open a door, and the natural inference, if two men are together, is that the other is waiting by his side at that time. The fact that a man may get beyond the stage of waiting does not, it seems to us, prevent him being indicted for the waiting, if, in fact, that offence has been proved. Humphreys J. in *Rex* v. *Goodwin* (1) said on the facts in that case, "It may be that there was ample evidence "that the appellant was in all probability waiting to commit "some such offence as stealing and that he had brought "himself within other words in s. 7, namely, 'waiting for an "'opportunity to commit . . . . an offence'." That is the charge in the present case.

In the view of this court there was evidence for the jury, the jury were properly directed and there can be no reason for this court to interfere with the verdict.

There are two observations that we think it right to make.

(1) [1944] K. B. 523.

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The first is to repeat that those responsible for settling indictments should follow the words of the statute creating an offence. The second is that we wish to repeat that which Humphreys J. said at the conclusion of his judgment in *Rex* v. *Goodwin* (1). "The court wish to add that where the facts of a case "afford evidence not only of an offence against s. 7 of the "Prevention of Crimes Act, 1871, but also of another offence, "such as attempted larceny or an offence under s. 4 of the "Vagrancy Act, 1824, which does not involve giving proof to "the jury of the prisoner's bad character, it is much more "satisfactory that the prisoner should be charged with that "other offence. Once a jury knows that the prisoner is given "to committing a particular class of crime, it is difficult for "them, notwithstanding their best endeavours, to treat him "in the same fair and impartial way as they would if they knew "nothing whatever about his past." That case was widely reported at the time, and we only say that we think those words of Humphreys J. deserved the very careful consideration of the police and prosecuting authorities. They were not said lightly; they were meant to be followed. We regret that they were not followed in this case. The appeal is dismissed.

Appeal dismissed.

Solicitors for appellant: *Edward Davis, Nelson & Co.*
Solicitor for the Crown: *Solicitor to Metropolitan Police.*

(1) [1944] K. B. 524.

C. G. M.

1944

Oct. 27;
Nov. 13.

Viscount Caldecote C.J., Humphreys and Birkett JJ.

GYTON *v.* PALMOUR.

Rates—Occupation of premises—Premises occupied by company—Order of High Court appointing receiver and manager of company's property—Entry in rate-book of name of receiver as occupier of premises—Liability of receiver.

A company was in rateable occupation of premises which they let out as offices and flats. On February 26, 1940, P. was appointed receiver and manager of the business of the company under a trust deed securing first mortgage debenture stock. On the same day P. was entered in the rate-book of a metropolitan borough council as occupier of the premises, but no notice of that entry was given to him. On March 7, 1940, P. was appointed a receiver and manager of all the property and assets of the company, except uncalled capital, by an order of the High Court, which did not contain any direction to the company to deliver up to P. possession of their property. On April 1, 1940, a general rate was made in respect of the premises for the half-year beginning on that date. Rates for the period from April 1, 1940, to August 20, 1940, when the premises were sold, having been demanded from P. and not paid, an application for a distress warrant was made against him as being personally liable :—

Held, (1.) that there had been no change of occupancy, the company remaining in rateable occupation of the premises, and (2.) that, on the application for a distress warrant, although P. had not appealed against the entry, not having been informed of it, he was entitled to plead that he was not in occupation of the premises.

In re Marriage, Neave & Co. [1896] 2 Ch. 663, followed.

CASE stated by a metropolitan magistrate.

The Mayfair and General Trust Co., Ld., carried on the business of owning, managing, maintaining and letting offices, flats and chambers, furnished or unfurnished. The company reserved the control of the entrances, staircases, passages and lifts, and the rents included rates and a sum to cover the provision of certain services and amenities. Up to February 26, 1940, the company was entered in the rate-book of the borough of St. Marylebone in the county of London as the occupier of the premises. The respondent, C. J. G. Palmour, was on that date appointed receiver and manager of the company under powers contained in a trust deed securing an issue of first mortgage debenture stock and on that date the respondent was entered in the rate-book of the borough council as the rated occupier of the premises. The respondent received no notice of this entry from the borough council and no appeal was entered by him against the entry. On March 7, 1940, the respondent ceased to act as receiver and manager under the appointment of February 26, 1940, and by an order of the High Court of March 7, 1940, he was appointed receiver and manager of all the property and assets, except uncalled capital, of the company. The order provided that the accounts and inquiries usual in a debenture holders' action should be taken, but it did not contain any order or direction to the company to deliver possession of any of the property and assets of which the respondent was appointed receiver and manager. The rates due up to March 31, 1940, in respect of the premises of the company were admitted by the respondent as preferential

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debts due to the borough council under s. 78 of the Companies Act, 1929. The appellant, W. H. Gyton, a collector of rates, on the authorization of the borough council, preferred a complaint before the magistrate, sitting as a court of summary jurisdiction, against the respondent, that he, being the person duly rated and assessed by a general rate made on April 1, 1940, in the sum of 924*l.* 14*s.* 7*d.*, which had been lawfully demanded, had not paid the same. The magistrate found that the rates had been made and demanded in respect of the property of the Mayfair and General Property Trust, Ld., for the period from April 1, 1940, to August 20, 1940, when the properties were sold, and that they remained unpaid for a space of seven days before making the complaint, but he held that he was bound by *In re Marriage, Neave & Co.* (1), to hold that the respondent was not and never had been in rateable occupation of these premises. Accordingly, he dismissed the complaint, but stated this case.

Comyns Carr K.C. and *Percy Lamb* for the appellant. The respondent was entered as the rateable occupier of these premises in the rate-book of the borough council on February 26, 1940, and, although these arrears of rates were demanded of him later by a demand note, he did not appeal against the entry. He cannot, therefore, take the point, on an application for a distress warrant, that he is not in rateable occupation of the premises: *Dent* v. *Overseers of Commondale* (2). Secondly, as from March 7, 1940, the date of the order of the High Court, appointing the respondent receiver and manager of the property of the company, the borough council were right in placing the name of the respondent in their rate-book, as being in rateable occupation of these premises, so that he was then personally liable for these rates, with a right of indemnity from the company: *Moss Steamship Co., Ld.* v. *Whinney* (3). Lord Atkinson in that case spoke of the property of a company " put into the possession or under " the control of the receiver and manager," appointed by the High Court (4) ; see also the observations of Jessel M.R., in *In re Manchester and Milford Ry. Co.* (5) and of Lord Esher M.R. in *Owen & Co.* v. *Cronk* (6), on the position of a receiver and manager appointed by the court, and of Lord Herschell L.C.,

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(1) [1896] 2 Ch. 663.
(2) (1891) 56 J. P. 519.
(3) [1912] A. C. 254.
(4) Ibid. 263.
(5) (1880) 14 Ch. D. 652–3.
(6) [1895] 1 Q. B. 271.

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in *Holywell* v. *Halkyn District Mines Drainage Co.* (1) and of Lords Russell of Killowen and Wright in *Westminster Council* v. *Southern Ry. Co.* (2) on what constitutes rateable occupation, that whole question being reviewed in the *Southern Ry.* case. There was here a change of occupancy from that of the company to that of the respondent. The respondent here was not the agent of the company, as was the receiver in *Richards* v. *Overseers of Kidderminster* (3). The decision in *Paterson* v. *Gas Light and Coke Co.* (4) cannot be reconciled with those of *Moss Steamship Co., Ld.* v. *Whinney* (5) and *Westminster Council* v. *Southern Ry. Co.* (6). As to *In re Marriage, Neave & Co.* (7) which the magistrate held bound him, before the appeal from Kekewich J., the rates demanded were apportioned and the proportion due as from the date of the appointment of the receivers and managers by the High Court was paid. In this case the respondent, the receiver and manager, was rated and assessed by a general rate made on April 1, 1940, in respect of the period after his appointment by the High Court, from April 1 to August 20, 1940. The observations of the judges of the Court of Appeal, therefore, in that case, that there was no change of occupation of the premises on the appointment of the receivers and managers were not in point in this and were obiter dicta in that case. The ground of the decision is that the existence of an equitable charge on the goods did not protect them from distress for poor rate. If these observations are in point here and not obiter, they are in conflict with the subsequent decision in the House of Lords of *Moss Steamship Co., Ld.* v. *Whinney* (5) which negatives the view that a receiver and manager is a mere caretaker. A corporation can only act by its servants and the question is, on whose behalf were the servants of the company acting? The answer is on behalf of the respondent, as receiver and manager who, in the words of Lord Atkinson in *Moss Steamship Co., Ld.* v. *Whinney* (5): "entirely supersedes the company "in the conduct of its business." He was in effective control of the letting of these offices and flats, and it was his task to decide whether to carry on or close down the business. The views expressed by the judges in the cases of *In re Marriage, Neave & Co.* (7) and *Paterson* v. *Gas Light & Coke Co.* (4) were vitiated by their regarding the question as one of title. Lord

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(1) [1895] A. C. 125.
(2) [1936] A. C. 529, 532–3, 551.
(3) [1896] 2 Ch. 212.
(4) [1896] 2 Ch. 476.
(5) [1912] A. C. 254.
(6) [1936] A. C. 511.
(7) [1896] 2 Ch. 663.

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Herschell L.C. said in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (1), " the question whether a person is an occupier " or not within the rating law is a question of fact and does not " depend upon legal title " (2).

Squibb for the respondent. The decision of *In re Marriage, Neave & Co.* (3) concludes this case. In that case, as in this, the order of the High Court did not direct the company to give up possession of its premises to the receivers and managers. The company in this case continued to occupy its premises, though its business was controlled by the respondent, as receiver and manager. The physical presence of the respondent on the company's premises is not an occupation of them by him. The question is not whether the respondent was in possession of these premises, but what was the quality or character of the possession. *In re Marriage, Neave & Co.* (3) was followed by Astbury J. in *National Provincial Bank of England, Ld.* v. *United Electric Theatres, Ld.* (4), although the date of the decision in *Moss Steamship Co., Ld.* v. *Whinney* (5) in 1911, preceded the decision of Astbury J. No question of rating was before the court in *Moss Steamship Co., Ld.* v. *Whinney* (5).

Comyns Carr K.C. replied.

Cur. adv. vult.

Nov. 13. VISCOUNT CALDECOTE C.J. delivered the following written judgment of the court. Counsel for the appellant invited us to say either that the decision of the Court of Appeal in *In re Marriage, Neave & Co.* (3) did not correctly state the law or that the judgments in that case were not in point and were obiter dicta. He relied also on the decision of the House of Lords in *Moss Steamship Co., Ld.* v. *Whinney* (5) as being inconsistent with *In re Marriage, Neave & Co.* (3). We were invited to examine with some care the facts as well as the decision in *In re Marriage, Neave & Co.* It appears that on February 6, 1896, one Paterson had been appointed by the trustees, under a second debenture trust deed, receiver and manager on behalf of the second mortgage debenture holders. On February 17, 1896, Paterson and one Stephens were appointed receivers and managers on behalf of the first mortgage debenture holders by an order of the court in a debenture

(1) [1895] A. C. 117.

(2) Ibid. 125.

(3) [1896] 2 Ch. 663.

(4) (1916) 80 J. P. 153 also reported [1916] 1 Ch. 132, but not on this point.

(5) [1912] A. C. 254.

holders' action. The order did not direct the company to give up possession of their premises to the receivers and managers, but on the day they were appointed they entered the company's premises to manage and carry on the business. On November 12, 1895, rates for the half year ending March 25, 1896, were demanded of the company and not having been paid on February 21, 1896, the company was served with a summons for the amount thus due by the churchwardens and overseers. On the hearing of the summons on March 2, 1896, the usual distress warrant was issued for the full amount due. The churchwardens and overseers on March 10, 1896, took out a summons asking that, notwithstanding the appointment of the receivers and managers in the action, they might be at liberty to distrain on the goods and chattels of the company for the amount due. When the summons came on for hearing Kekewich J. held that a change of occupation within the meaning of s. 16 of the Poor Rate Assessment and Collection Act, 1869, had taken place on February 17, 1896, when the receivers and managers were appointed and entered on the company's premises, and that, as from that date, the receivers and managers should be regarded as "new occupiers" of the premises. He held, accordingly, that the goods and chattels on the premises were not liable to distress for the rates in question. The sum due was subsequently apportioned under s. 16, and the receivers and managers on a formal demand by the churchwardens and overseers paid the proportion due in respect of the period from the date of their appointment to the end of the half year for which the rate was made. The order of Kekewich J. was then appealed from and the appeal succeeded. Lindley L.J. said (1): "The first question we "have to consider is whether there has been such a change of "occupation as brings into operation the 16th section of the "Poor Rate Assessment and Collection Act, 1869." After pointing out the important fact that the order did not contain a direction for delivery-up of possession of the land to the receivers and managers, Lindley L.J., continued: "They have "gone on to the property for the purpose of receiving and "managing the income and business of the company, but they "have not done anything to change the ostensible possession "of the property in any way whatever; and, upon the facts, "it appears to me that the possession and occupation have "not been changed at all," and later he said: "The real truth

(1) [1896] 2 Ch. 671.

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"is that the company were and are still, in point of law, in "occupation of the property and the receivers are there as "managers of the company's business." Lopes L.J., dealt with the same point. He said (1): "What the receivers have to do "is to go there and manage the property. The occupation, "in my judgment, remained in the company in precisely the "same way as it did before. The company continued to "occupy notwithstanding that order." A declaration, accordingly, was made that the churchwardens and overseers were entitled to distrain on the company's goods.

We are unable to distinguish the facts of *In re Marriage, Neave & Co.* (2) from the material facts in the present case. Mr. Comyns Carr submitted, if I understood him aright, that in the case now before the court the amount due from April 1 to August 20, 1940, during the period when the respondent was receiver and manager by virtue of his appointment by the High Court, which had not been paid, was all that was in question, whereas in *In re Marriage, Neave & Co.* (2) the amount claimed had been apportioned and the sum due in respect of a similar period had been paid, but that is just what the Court of Appeal, by their declaration and their judgments, seem to me to have decided was wrong. The decision of the Court of Appeal was based on the view, which was clearly stated by all the members of the court, that the company remained, in point of law, in occupation of the premises, and that the receivers were merely there as managers of the company's business. As Rigby L.J. observed (3), they "might have performed all their duties "without even seeing this property." It was further submitted by Mr. Comyns Carr that the decision in that case, even if in point, could not be supported in view of the decision of the House of Lords in *Moss Steamship Co., Ld.* v. *Whinney* (4). In that case the respondent had been appointed receiver and manager of a brewery company by an order of the court made in a debenture holders' action, and, in the course of carrying on the business of the company, he consigned a quantity of beer to the company at Malta under a bill of lading which provided that the shipowners carrying the beer should have a lien on the goods shipped not only for the freight due thereon but also for any previously unsatisfied freight "due either from shippers or "consignees to the shipowners." The House of Lords held that the shipowners were not entitled to a lien for arrears of

(1) [1896] 2 Ch. 674.
(2) Ibid. 663.
(3) Ibid. 676.
(4) [1912] A. C. 254.

freight because the receiver and manager and not the company was both shipper and consignee and there was no previously unsatisfied freight due from him. Lord Loreburn L.C. agreed with Fletcher Moulton L.J., who had delivered a dissenting judgment in the Court of Appeal, that the company was still alive and that its business was still being carried on by the receiver and manager, but disagreeing with Fletcher Moulton L.J., he said that the receiver and manager was not carrying on as the company's agent. " He superseded the " company, and the transactions upon which he entered in " carrying on the old business were his transactions upon which " he was personally liable. He was really a trustee and the " shipowners dealt with the trustee " (1). So far, we find nothing in conflict with the decision of *In re Marriage, Neave & Co.* (2). Lord Loreburn and the other noble Lords seem to me to have decided the question simply on the ground that the consignment of the beer was made by the receiver and manager, not acting as the company's agent, but as a transaction upon which he was personally liable. Mr. Comyns Carr, however, relied very strongly on a passage in Lord Atkinson's opinion when he said (3) : " This appointment of a receiver and manager " over the assets and business of a company does not dissolve " or annihilate the company any more than the taking " possession by the mortgagee of the fee of land let to tenants " annihilates the mortgagor. Both continue to exist : but it " entirely supersedes the company in the conduct of its business, " deprives it of all power to enter into contracts in relation to " that business, or to sell, pledge, or otherwise dispose of the " property put into the possession, or under the control of the " receiver and manager. Its powers in these respects are " entirely in abeyance." We find it impossible to believe that Lord Atkinson could have thought that his words would be cited as bearing on the question of occupation for rating purposes. It is only by an extension of the meaning of the words " put into the possession, or under the control of the " receiver and manager," that it can be said at all that, even if the receiver and manager is put into possession of the property, he is, therefore, in beneficial occupation.

The nature of rateable occupation has been so frequently stated that it may seem unnecessary to repeat any of the statements which have been made, but in *Westminster Council*

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(1) [1912] A. C. 259.

(2) [1896] 2 Ch. 663.

(3) [1912] A. C. 263.

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v. *Southern Ry. Co.* (1), there is a passage in the opinion of Lord Russell of Killowen, which will bear repetition (2): "The occupier, not the land, is rateable; but the occupier is "rateable in respect of the land which he occupies. Occupation, "however, is not synonymous with legal possession: the owner "of an empty house has the legal possession, but he is not in "rateable occupation. Rateable occupation, however, must "include actual possession and it must have some degree of "permanence: a mere temporary holding of land will not "constitute rateable occupation." In the present case, whatever the nature of the possession into which the receiver and manager was put by the order of the court, it seems plain to us that it fell far short of the occupation which is necessary in order to constitute rateability. We may cite a short passage from the speech of Lord Herschell L.C., in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (3): "The question "whether a person is an occupier or not within the rating law "is a question of fact and does not depend upon legal title."

On the whole of this case we agree with the decision of the learned magistrate, that he was bound by the decision of the Court of Appeal in *In re Marriage, Neave & Co.* (4), but, apart altogether from the judgments in that case, we think the contention of the respondent that there had never been here a change of occupation to justify the entry of the respondent as occupier of these premises in the council's rate book, is right.

It remains for us to deal with a submission which Mr. Comyns Carr made, I think rather faintly, that it was too late for the respondent to question his liability in view of the fact that his name had been entered in the rate book as occupier of the premises and that he had not appealed against the entry. In support of this contention reliance was placed on *Dent* v. *Overseers of Commondale* (5). In that case it was proved that the premises mentioned in the entry were beneficially occupied by the liquidator of a company, that he was the only visible occupier and that he received everything and paid everything in connexion with the premises. Lord Coleridge C.J. said: "Here is an appeal against a rate which is good on the face of it. "It depends on whether the liquidator's name was used merely "as liquidator and nothing else. The overseers gave evidence "that he was an occupier of the premises in the ordinary sense."

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(1) [1936] A. C. 511.
(2) Ibid. 529.
(3) [1895] A. C. 125.
(4) [1896] 2 Ch. 663.
(5) (1891) 56 J. P. 519.

On that Lord Coleridge held that, as the rate was good on its face, and as the person rated had not impeached the assessment, he must be taken to be the person against whom a distraint warrant must issue. We do not think that that case is an authority for the proposition for which Mr. Comyns Carr contended that an entry in the rate book of the name of a person who was ignorant of the entry was sufficient to create liability. It could not be contended that such an entry would give rise to liability in a case where a complete stranger had, by some mistake, been entered in the rate book without his knowledge. The respondent, Palmour, in this case received no notice of the entry of his name in the rate book as occupier of the premises. In the present case the whole question is whether, as from the date of the order of the court appointing the respondent receiver and manager of the property of the company, beneficial occupation was created by the mere order of the court. We do not think it was. For these reasons, we think the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co.*
Solicitors for respondent: *Last, Sons & Fitton.*

C. G. M.

[An appeal was entered against this judgment, but was withdrawn shortly before it was due for hearing.]

REX *v.* DAVIES.

Ex parte DELBERT-EVANS.

1945
May 14, 15.
Humphreys and Oliver JJ.

Contempt of court—Conviction on criminal charge—Appeal—Comments in newspaper before hearing of appeal—Proceedings sub judice—Jurisdiction of High Court to attach.

A criminal cause remains sub judice until the time has expired within which notice of appeal to the Court of Criminal Appeal may be given, or, in the event of such notice being given, until the appeal has been heard and determined, and comments made in a newspaper before the expiration of such periods may be the subject of proceedings for contempt of court if they are intended or calculated to prejudice the fair hearing of the appeal.

APPLICATION for an order for a writ of attachment.

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On November 29, 1944, the applicant, Alva Delbert-Evans, who was then a registered medical practitioner, was convicted at the Central Criminal Court on ten counts of an indictment charging him with conspiracy to procure miscarriage and with procuring miscarriage. Before sentence was pronounced a police officer stated, inter alia, that the police had statements from nineteen other women in addition to those referred to at the trial and that they had regarded the applicant as a professional abortionist for a considerable time. The applicant was sentenced to five years penal servitude and gave notice of appeal against conviction only.

On December 3, 1944, the respondent, David Percy Davies, who was the editor of the " News of the World " newspaper, published in that paper an article containing comments on the trial of the applicant at the Central Criminal Court. The article was headed " Doctor unmasked," " Scotland Yard " were after him for twenty years " and in the body of the article the following statements, inter alia, were made : " The " first complaint the police ever received against Delbert-Evans " was twenty years ago " ; " Without evidence to justify an " arrest they were patient " ; " The principal question still " puzzling Scotland Yard is the whereabouts of the fortune " Delbert-Evans is believed to have amassed . . . . the police " believe he is only pretending poverty and has, in fact, hidden " most of his earnings."

On December 21, 1944, the applicant applied to a Divisional Court for leave to apply for a writ of attachment against the respondent on the ground that when notice of appeal against a conviction has been given to the Court of Criminal Appeal, the case remains sub judice until the hearing and decision of the appeal, and that, consequently, adverse statements regarding the conduct and character of the appellant might constitute a contempt of court as being calculated to prejudice the fair hearing of the appeal. The Divisional Court granted the application. On February 14, 1945, the applicant's appeal against conviction was dismissed by the Court of Criminal Appeal.

Beresford K.C. and *Diamond* for the applicant. The Divisional Court rightly granted leave to the applicant to apply for a writ of attachment in this case since the cause was " pending " at the time when the article was published. " A cause is said to be pending in a court of justice when any

" proceeding can be taken in it," per Jessel M.R., *In re Clagett's Estate; Fordham* v. *Clagett* (1). When a person has been convicted on indictment at the Central Criminal Court, he has ten days within which to give notice of appeal. That is a step which he can take, and until the time for appealing has expired, or if notice of appeal has been given, until the appeal has been heard and determined, the cause is still pending. In *Brodie* v. *Bevan* (2) which might appear to be against this view, Sargant J. quoted Oswald on Contempt, 2nd ed., p. 62, to the effect that " proceedings are pending immediately the writ is issued, " and as long as any proceedings can be taken. But when the " cause is dead or ended, comments may be made; and the fact " that a new trial has been ordered makes no difference." For that proposition, which Sargant J. accepted, Oswald cites two authorities, *Metzler* v. *Gounod* (3) and *Dallas* v. *Ledger* (4), but it is submitted that those cases do not support the view expressed. It should also be noted that no new edition of Oswald has been published since the Court of Criminal Appeal was established in 1907. Since that time, a case is by no means deemed to be over when a person has been convicted on indictment. The convicted person has a statutory right to apply to the Court of Criminal Appeal for various things to be done, one of which is that the court should award a venire de novo, if it decides to quash the proceedings on the indictment. If comments have been made before that decision is reached, they may come to the knowledge of a juryman, who may have to try the issue raised by the indictment, and may also have the effect of embarrassing the judge in the performance of his duty. [They also referred to *In re Martindale* (5); *Rex* v. *Parke* (6), and *Glasgow Corporation* v. *Hedderwick & Sons* (7).]

Valentine Holmes and *Arthian Davies* for the respondent. It is not contended that in no circumstances could a comment be made between the date of the conviction of a person and the hearing of an appeal which would amount to a contempt of court, though, until it is over-ruled, *Rex* v. *The Editor of the People* (8) appears to preclude the court from committing for contempt after a criminal trial has been completed by the verdict of the jury and sentence. In any event it shows that extreme circumstances are necessary before the court will

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(1) (1882) 20 Ch. D. 637, 653.
(2) [1922] 1 Ch. 276, 284.
(3) (1874) 30 L. T. 264.
(4) (1888) 4 T. L. R. 432.
(5) [1894] 3 Ch. 200.
(6) [1903] 2 K. B. 432.
(7) 1918 S. C. 639.
(8) The Times, Apr. 5, 1925.

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exercise its jurisdiction. The law on the subject of contempt is correctly stated in Halsbury's Laws of England, 2nd ed., vol. VII., p. 2, paras. 2, 11, 13. Two matters have to be considered before the court will make an order (1.) whether in point of fact the statements made in the article constitute a contempt, and (2.) if so, whether the case is one in which the court in its discretion will make an order. In *Rex* v. *The Editor of the Daily Mail* (1) Lord Hewart C.J., quoting the language of Lord Russell of Killowen C.J. in *Reg.* v. *Payne* (2) said that "the applicant must show that something has been "published which either is clearly intended, or at least is "calculated, to prejudice a trial which is pending"; and again, quoting Cotton L.J. in *Hunt* v. *Clarke* (3), Lord Russell said: "there should be no such application made unless the thing "done is of such a nature as to require the arbitrary and "summary interference of the court in order to enable justice "to be duly and properly administered without any interruption or interference . . . ." With regard to the question whether the article here was intended or calculated to prejudice the hearing of the appeal it is inconceivable that any judge sitting as a member of the Court of Criminal Appeal could possibly be embarrassed by it in deciding any question of law which might come before him in that court. In those circumstances the case is not one in which the court should make an order.

HUMPHREYS J. stated the facts, and continued: The question of law which we have to determine in this case may be put in this way: where a man has been convicted on indictment of a criminal offence and, is, or probably will be, an appellant to the Court of Criminal Appeal against that conviction, can any comments made by a newspaper in relation to the case be made the subject of proceedings for contempt of court? Mr. Valentine Holmes, who appeared for the respondent, said that, put in that way, he had great doubt whether he was in a position to argue to the contrary, and his real answer to the motion which is made in this case for the committal of the editor of the "News "of the World" is that on the facts of the case there was no contempt at all, and that even if the court were to hold that there was something which might amount to contempt, this was not a case in which the court would make any order. All that I find it necessary to say about the matter is to refer to and found myself on two of the many cases to which we have been referred. The first is *Rex* v. *Parke* (1). The point raised in that case is quite different from any raised in the present case and the matter actually decided was that the court had jurisdiction to attach the publisher of a newspaper for contempt of court, notwithstanding that at the time of the publication of the matter of which complaint was made, the person charged had not yet been committed for trial. There are some observations to be found in the judgment of Wills J., who delivered the judgment of the court, consisting of Lord Alverstone C.J., Channell J. and himself, which are worthy of reiteration. He said: " The reason why the publication of articles like those " with which we have to deal is treated as a contempt of court " is because their tendency, and sometimes their object, is to " deprive the court of the power of doing that which is the end " for which it exists—namely, to administer justice duly, " impartially, and with reference solely to the facts judicially " brought before it. Their tendency is to reduce the court " which has to try the case to impotence, so far as the effectual " elimination of prejudice and prepossession is concerned. " It is difficult to conceive an apter description of such conduct " than is conveyed by the expression ' contempt of court.' " If it be once grasped that such is the nature of the offence, " what possible difference can it make whether the person has " been committed for trial or is going to be committed for trial?" The other passage in that judgment of Wills J. to which I desire to refer is this: " Great stress has been laid by " Mr. Danckwerts upon an expression which has been used in " the judgments upon questions of this kind—that the remedy " exists when there is a cause pending in the court. We think " undue attention has been attached to it. It is true that in " very nearly all the cases which have arisen there has been a " cause actually begun, so that the expression, quite natural " under the circumstances, accentuates the fact, not that the " case has been begun, but that it is not at an end. That is the " cardinal consideration. It is possible very effectually to " poison the fountain of justice before it begins to flow. It is " not possible to do so when the stream has ceased." The next case to which I desire to refer is *Brodie* v. *Bevan* (2) in which Sargant J. took occasion to deal somewhat thoroughly with the law of contempt. In the course of his judgment he said: " It

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(1) (1928) 44 T. L. R. 306.

(2) [1896] 1 Q. B. 577, 581.

(3) (1889) 58 L. J. (Q. B.) 493.

(1) [1903] 2 K. B. 432, 436.

(2) [1922] 1 Ch. 276, 284.

"seems to me that the law is pretty well settled in these cases "now. I do not deal, of course, with the case of a report "which amounts to scandalizing the court by making attacks "upon the judge who presided at the trial—that is entirely out "of the question here, and there is nothing in the circular to "be complained of by the judge who tried the case. The only "other sort of contempt which I think could effectively be "established against the plaintiffs is that they were doing "something which was interfering in some sort of way with the "administration of justice. But as to this the principle is put "thus in a well-known work—Oswald on Contempt of Court, "2nd ed., p. 62: 'Proceedings are pending immediately the "'writ is issued, and as long as any proceedings can be taken. "'But when the cause is dead or ended, comments may be "'made'."

I find it sufficient to found myself on the observations made in the above two cases, but in *Reg.* v. *Payne* (1), which has been regarded for many years as the leading case on contempt of court, but to which, I think, the attention of the court which granted the applicant's ex parte application in the present case was not directed, the members of the court went a long way in drawing attention to the undesirability of any such proceedings as those in the present case being taken except on very clear grounds. We have been reminded of some passages in the judgment of Lord Russell of Killowen C.J., to the following effect: "I wish to express the view which I entertain, "that applications of this nature have in many cases gone too "far. No doubt the power which the court possesses in such "cases is a salutary power, and it ought to be exercised in cases "where there is real contempt, but only where there are serious "grounds for its exercise. Every libel on a person about to be "tried is not necessarily a contempt of court; but the applicant "must show that something has been published which either "is clearly intended, or at least is calculated, to prejudice a "trial which is pending." Later on his lordship approved of the judgment of Cotton L.J. in *Hunt* v. *Clarke* (2) where he used these words: "There should be no such application made "unless the thing done is of such a nature as to require the "arbitrary and summary interference of the court in order to "enable justice to be duly and properly administered without "any interruption or interference, that is what we have to "consider." In that particular case, while Cotton L.J.

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(1) [1896] 1 Q. B. 577, 580.

(2) 58 L. J. (Q. B.) 490, 493.

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thought that a contempt of court had been proved, he added that the contempt may be technical, and was of opinion that in that case there had not been any such interference, or any fear of interference, with the due conduct of the action, or any such prejudice to the defendant as rendered it desirable that the court should make any order. Wright J., in agreeing with the Lord Chief Justice, said this : " I agree with all that the Lord " Chief Justice has said, and I only wish to add that, in my " opinion, in order to justify an application to the court, the " publication complained of must be calculated really to " interfere with a fair trial, and, if this is not the case, the " question does not arise whether the publication is so " objectionable in its terms as to call for the interference of the " court. If the publication is found to be likely to interfere " with a fair trial, a second question arises, whether, under the " circumstances of the case, the jurisdiction which the court in " that case possesses ought to be exercised, not so much for " punishment as for preventing similar conduct in the future. " That is the rule which I wish to adopt with regard to " applications of this nature." A consideration of those authorities, with which, whether they are binding on me or not, I respectfully agree, leads me to this question : Can the publication of any defamatory matter, or of any matter which would amount to a contempt of court if it had been published before the applicant in the present case had been tried by a jury, be said to be calculated to interfere with the due course of law and justice by prejudicing the fair hearing of the applicant's appeal ? In considering this question one must remember what are the powers of the Court of Criminal Appeal. If that court existed for the sole purpose of deciding questions of law which come before it, the answer to the question I put above might well be in the negative. It might be said that it is inconceivable that any court considering a pure question of law could be affected by anything written in a newspaper about the character of one of the parties in a civil or criminal case. It is, indeed, inconceivable that if one of the judges of such a court had happened to have read the particular newspaper in question, it could have the smallest effect on him. Those observations, however, do not apply in the case of the Court of Criminal Appeal. That court has many functions to perform. One of the powers which it possesses, as was decided by the House of Lords in *Crane* v. *Director of Public Prosecutions* (1),

(1) (1921) 15 Cr. App. R. 183.

is that when it finds that proceedings on an indictment are for any reason void, it may order a trial of the indictment in question. It, therefore, has the power which used to exist in the court for the consideration of Crown Cases Reserved, of awarding venire de novo. The effect of that is that in any case coming before it the Court of Criminal Appeal may direct that a jury shall be sworn to try the issue on the indictment which has never properly been tried. It is, therefore, quite a fallacy to treat this case as if all that the Court of Criminal Appeal could do with regard to it would be to decide a question of law. It may be true in a sense that they are deciding a question of law, but the effect of their decision may be that a jury will have to try the question of fact. It follows that any matter which is published between the date of a conviction and the date of the hearing by the Court of Criminal Appeal may come to the attention of a juryman who has to try the question of the guilt or innocence of some person on the indictment in respect of which venire de novo has been awarded. In my opinion the consideration of that fact is a sufficient answer to the question: can the publication of defamatory matter in such a case as the present possibly prejudice the fair trial of an accused person? The answer is: it certainly may. It is unlikely, because cases of venire de novo do not happen every day, but, if my recollection is correct, there have been three or four cases at the very least since I have been a judge, and the possibility that the court may order one always exists. There is another matter regarding which I desire to say a few words. I think it is a fallacy to assume that the only object of imposing punishment for contempt of court in a criminal case is to prevent a juryman, who may be trying the person affected, from reading matter of which he ought to know nothing. There is also the judge to be considered, and, while I am not saying for a moment that any person sitting in a judicial capacity, who may, be it remembered, be a chairman of quarter sessions, who may or may not be a lawyer, or a recorder, or it may be, of course, one of the judges of the King's Bench Division, would be affected by anything he might read, I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I do not suggest that it is likely that any judge, as the result of information which had been improperly conveyed to him, would give a decision which otherwise he would not have given, it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty. To repeat the words I have already read from the judgment of Wills J. in *Rex* v. *Parke* (1). "The reason "why the publication of articles like those with which we have "to deal is treated as a contempt of court is because their "tendency and sometimes their object is to deprive the court "of the power of doing that which is the end for which it exists "—namely, to administer justice duly, impartially, and with "reference solely to the facts judicially brought before it." It seems to me that the bringing before the minds of judges who have to try an appeal in a criminal case matters which they do not desire to know, and which if brought to their attention are likely to embarrass them in the fair and impartial consideration of the case, is wrong. Whether that view is right or not, I cannot say. It is my own opinion and I express it as such, but I venture to think that no judge with long criminal experience will fail to be able to recall instances in which the publication of matters such as that to which I have referred has had the effect of making the task of a judge extremely difficult, and no one has the right to publish matter which will have that effect. Those are the reasons why, in my opinion, there is ample authority for saying that during the time between the conviction of an accused person on indictment and his appeal to the Court of Criminal Appeal the case is not ended at all, but is still sub judice, or pending, to use the expression which has been used in many cases and in many judgments, and the publication of improper matter may amount to a contempt of court. It is said that *Rex* v. *The Editor of the People* (2) is an authority to the contrary of the proposition I have stated, but as I understand the judgment in that case it was based on the view of the court that the articles published were not calculated to prejudice the fair hearing of the appeal, and the decision is no authority for the proposition that in some other case something published by some other newspaper may not amount to a contempt of court and be punishable as such. That is all I desire to say on the question of law, which, on the argument of the applicant's counsel, was really the sole question which we had to consider. Before finally leaving the matter, I would say in passing that I entirely agree with the summary of the law of contempt in Halsbury's Laws of England, 2nd ed., vol. VII., p. 2, in which I do not think there is anything contrary to the views which I have expressed as being my own.

(1) [1903] 2 K. B. 432.

(2) The Times, Apr. 7, 1925.

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Having decided that question of law, we are only at the beginning of this case. The only opinion I have expressed so far is that in the present case it is no answer for the editor of the "News of the World" to say, "I only published this "article after this man had been convicted." That is no answer, and I still have to look at the article to see whether in my opinion it amounted to a contempt of court with which this court ought to deal, having regard to the very strong observations made by Lord Russell of Killowen C.J. in *Reg.* v. *Payne* (1). [The learned judge considered the terms of the article and continued :] I have the gravest doubt whether there can be found in this particular article anything which could be said to be contempt of court in the circumstances of this case, where the appeal was against conviction and not against sentence. What I am quite clear about is that even if it could be said that the statements made did amount, or might amount, to a contempt of court, no harm has been done to anybody. The applicant appealed to the Court of Criminal Appeal and the court heard his appeal and dismissed it, and it is extremely unlikely that even if any member of the court had read this article he would have been in the least interested in it from the point of view of the question which the court had to decide. My own view is that no order should be made on these proceedings in regard to the alleged contempt by the editor of the "News of the World." I desire to add that newspapers or editors of newspapers who choose to publish comments on the facts of a criminal case other than those facts given in evidence in open court, while the case is still pending—and it is still pending while the time for appealing has not run out—and more particularly if they choose to make such comments in the case of a man who is appealing or is proposing to appeal, do so at their peril. I should have no sympathy with any editor who, perhaps as the result of having some special person in his employment to deal with this class of news, finds himself in the position of having overstepped the line in his paper and of having said things which, in the view of the court dealing with the matter, might prejudice the fair hearing by the Court of Criminal Appeal. It is very much better that editors of newspapers should wait until a case is finally over before making any observations they desire to make about it, and I think a criminal case may be said to be finally over when the Court of Criminal Appeal has heard and determined the appeal.

(1) [1896] 1 Q. B. 577.

if any. After that time they are in no peril of being dealt with for contempt of court. They are the best judges of whether they are inviting an action for libel and whether they desire it or not, but there is no longer any question of proceedings for contempt. The result, in my opinion, is that in this case no order should be made on the motion.

OLIVER J. I agree with my Lord that no order should be made in this case. I also agree with everything he has said regarding the question of law which has been raised. In my view, on the authorities, contempt of court can be committed at any time until the case is ended, and it is not ended until after the hearing and decision of an appeal, if there has been an appeal. I fully agree with my Lord, and I share his view as to the importance of the matter, that jurors are not the only people whose minds can be affected by prejudice. One of the evils of inadmissible matter being disseminated is that no one can tell what effect a particular piece of information may have on his mind. Why, as my Lord has asked, and I can think of no better word, should a judge be " embarrassed " by having matters put into his mind, the effect of which it is impossible to estimate or assess? As an illustration of this proposition, the Court of Criminal Appeal has expressed, not once but many times, its thorough disapproval of evidence which is sometimes given by police officers at the end of a case when a man has been convicted. On such occasions all sorts of allegations are frequently made against a man's character, sometimes in the nature of hearsay and sometimes not supported by evidence at all. What is the ground for the disapproval of the Court of Criminal Appeal regarding such statements? It can only be that the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. If there is another reason for the disapproval of such statements expressed by the Court of Criminal Appeal it may well be this, that such matter ought not to be before the court on an appeal, and if it appears on the shorthand note it will be brought to the notice of the court. There being, in my opinion, jurisdiction in us to hear this application, it becomes a question whether on the facts of this case we ought to interfere by attachment. Not all defamatory matter can amount to contempt of court. It is unnecessary to go through the authorities, but that appears in case after case. Whether

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defamatory matter amounts to contempt in any particular case is a question in each case of fact, of degree and of circumstances. Obviously far less would amount to contempt of court if the matter were published before the hearing by a jury than would be required before a hearing by a judge or by the Court of Criminal Appeal. Publication at the end of a notorious trial of all sorts of gossip about a man who has been convicted is, of course, highly undesirable, and I associate myself with my Lord's observations when he said that editors of newspapers who publish such comments do so at their peril. On the facts of this particular case I agree that what was published does not amount to contempt of court. The appeal here was against conviction only, and the matters published, so far as I can see, went only to the question of sentence. I agree that when analysed what was published was very little worse than what was proved in evidence, and I do not think that it could be said to be calculated to bring about an interference with the administration of justice. I desire to add this. Much is said to-day about the freedom of the press, and I only wish to point out that our decision in this case comes to no more than this: that everything the public has a right to know about a trial of the kind with which we are here concerned, that is to say, everything that has taken place in open court, may be published, and beyond that there is no need or right to go.

Motion refused.

Solicitor for the applicant: *Samuel Coleman.*
Solicitors for the respondent: *Roche, Son & Neale.*

P. B. D.

1945

May 4.

Humphreys, Wrottesley and Tucker JJ.

ADREMA, LIMITED *v.* JENKINSON.

Emergency legislation—Essential work—Scheduled undertaking—Termination of employment in undertaking of specified person—Alteration of character of work in undertaking—Essential Work (General Provisions) (No. 2) Order, 1942 (St. R. & O., 1942, No. 1594), art. 4 (1.) (a).

The appellants, owners of a scheduled undertaking, were charged with having terminated the employment in the undertaking of D. H., a specified person, contrary to art. 4 (1.) (a) of the Essential Work (General Provisions) (No. 2) Order, 1942. D. H. was employed as supervisor of the embossing department. The appellants informed her by letter that they had appointed someone else in her place, and that in future she was to act as an embossing operator. She refused, but consented to do the work of a checker in the same undertaking at the same rate of wages as before, no interval supervening, and, in fact, did so. The permission of the national service officer to the change of work had not been sought or obtained :—

Held, that this change of work did not constitute within the meaning of the order, the termination of the " employment in " the undertaking " of D. H., and that the offence charged had not been proved.

CASE STATED by a metropolitan police magistrate.

At a court of summary jurisdiction sitting at Marlborough Street on October 3 and 10, 1944, an information was preferred by John Jenkinson, a national service officer, against Adrema, Ld., a scheduled undertaking within the Essential Work (General Provisions) (No. 2) Order, 1942 (1), for that they on May 30, 1944, did terminate the employment in the said undertaking of Doris Haag, a specified person within the order, without the permission in writing of a national service officer.

The defendants were the proprietors of Adrema Works, Horley, a scheduled undertaking within the order. In April, 1943, one Doris Haag, a specified person within the order, was employed by the defendants as supervisor of their embossing department. On April 17, 1944, the defendants applied to the national service officer for permission to terminate her employment, which application was refused, and at no time subsequently granted. On May 30, 1944, the defendants appointed a Mrs. Holland as supervisor of their embossing department, and on the same day they sent a letter to Doris Haag stating : " This is to advise you that Mrs. Holland has been appointed " to take charge of the embossing department at Horley, " and from now on you will carry out the work of an embossing " operator." Doris Haag refused to do the work of an embossing operator, but consented to do the work of a checker, and did

(1) Essential Work (General Provisions) (No. 2) Order, 1942 (St. R. & O., 1942, No. 1594), art. 4 (1.) : " Subject as hereafter " in this Order provided, where a " person carries on a scheduled " undertaking the following pro- " visions shall apply—(*a*) the " person carrying on the under- " taking shall not terminate (ex- " cept for serious misconduct) the " employment in the undertaking " of any specified person or with- " out terminating such employ- " ment cause him to give his " services in some other under- " taking . . . . except with the " permission in writing of a " national service officer."

so until June 10, 1944, when she was taken ill, being paid at the same rate as before. The work of a checker was different from that of a supervisor, but was performed in the same department of the works.

For the defendants it was contended that they had not terminated the employment by the letter of May 30, since Doris Haag had continued to be employed in the said undertaking after that date.

The magistrate, " being of opinion that on the true inter- " pretation of art. 4 (1.) (*a*) of the above order the word " ' employment ' denotes not merely a contractual relationship " but work of a particular sort, held that an alteration of an " employee's work was equivalent to the termination of the " employee's employment and that the defendants had " determined the employment of Doris Haag." He therefore convicted the defendants, but stated this case.

Valentine Holmes and *R. T. Paget* for the defendants. The magistrate was wrong. It would be very strange if an employer could not agree with his employee to change his employment in the same undertaking. The defendants had been refused leave to terminate the employment of Doris Haag, but for the purposes of the present case that is irrelevant. The words of the order are not " employment " but " employment " in the undertaking." Here there was no reduction in the rate of pay, which it is agreed would be a breach of the employment, and there is no finding whether the change was promotion or demotion. Throughout the order a distinction is made between " employment " and " work." " Employment " is used in the sense of the relationship between the parties, while " work " is confined to the work which the employee does. Here there was no termination of " employment in the under- " taking," that is, in the relationship of employer and employee. [*Jackson* v. *Fishers Foils, Ld.* (1) and *W. Dixon, Ld.* v. *Patterson* (2) were referred to.]

R. Lane Mitchell (*Arthian Davies* with him) for the national service officer. The letter of May 30 constituted a dismissal of Doris Haag, and the contract to act as checker was a new contract. " Employment " means work of a similar character, which the work of a checker is not. It does not refer to contractual relationship. The consent of the employee is immaterial. Even if an employee, to his delight, is promoted

(1) [1944] K. B. 316.

(2) 1943 S. C. (J.) 78.

without the requisite permission the offence is still committed, and in fact this clearly seems to have been demotion. [*George* v. *Mitchell & King, Ld.* (1) was referred to.]

Holmes in reply. The object of the clause is to prevent workmen being taken or going from one factory to another, and the present case is not within that mischief. To change a man's servant from housemaid to cook is a change of employment, but is not a change of employment in the service. The order creates a criminal offence and should therefore be strictly construed.

HUMPHREYS J. This is a case stated by one of the metropolitan magistrates, who convicted the defendants, and inflicted a fine upon them for having committed an offence against the Essential Work (General Provisions) (No. 2) Order, 1942. The offence is stated in these terms: the defendants, being persons carrying on an undertaking scheduled under that order, did terminate the employment in the said undertaking of Doris Haag, a specified person within the meaning of the said order, without the permission in writing of a national service officer. The case raises a very short point, but one which Mr. Valentine Holmes, who argued the case for the defendants, told us he thought might be of considerable public importance. The sole question is whether, on the facts, the employer, who comes within the language of the order, did terminate the employment in the undertaking of the person named, who is also a person who comes within the words of the order. [His Lordship read the facts as stated by the magistrate and continued:] Upon those facts it was contended on behalf of the defendants that they had not terminated the employment in the said undertaking of Doris Haag on May 30, 1944, since she continued to be employed in the said undertaking after that date.

On behalf of the respondent national service officer it was argued that the defendants had terminated the employment of Haag by their letter of May 30, and that to employ her as a checker was to engage her in a fresh employment on different work of an inferior grade, though at the same wages, and therefore the defendants were guilty of the offence with which they were charged. Certain authorities were drawn to the attention of the learned magistrate, but in my view none of those authorities is of assistance in the elucidation of this simple question: Upon the facts of the case, is it right to say that the defendants did terminate the employment in the undertaking of the lady by their letter of May 30? The learned magistrate gives his own view as follows: "I being of the opinion that, "upon the true interpretation of art. 4 of the order, the word "'employment' denotes not merely a contractual relationship "but work of a particular sort, held that the alteration of the "employee's work was, in the circumstances of this case, "equivalent to the termination of the employee's employment, "and that the defendants had terminated the employment of "the said Doris Haag."

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(1) (1943) 59 T. L. R. 153.

The first observation I desire to make is that I cannot find in the words which I have read, and which are the essential words of this order, anything to justify the view of the learned magistrate that the word "employment" denotes work of a particular sort. I have great difficulty, therefore, in coming to the conclusion that an alteration in the work of an employee necessarily, at all events, amounts to a termination of the employment of the employee. I am far from saying that there may not be circumstances which may arise in some case in which so great an alteration is made in the position of the employee by an order of his employers that it may be said that his position is impossible, that the effect of what is done by his employers is in effect to terminate his employment altogether, but, dealing with this case, as I am disposed to deal with it, solely on the facts of the case, I cannot agree that it is correct to say, as a matter of English, that this lady's employment was terminated at all. I would add that I think it is immaterial to consider whether the employers desired to get rid of this lady, and, if they did desire to get rid of her as an employee, what their reason was. I do not think it matters in the least. What we have to consider is what they did, and whether what they did amounts to a criminal offence against the terms of this order. What they did was not to write a letter saying: "You "must leave our employment," or "We desire you to leave "our employment." What was done was to direct her that her work was to be altered, and, although the letter does not say so it is clear that the intention was that she was to be paid the same wages as she had hitherto enjoyed, and she was told that she was in the future to work as an embossing operator. In my opinion, to say that a person, because the nature of his work is altered, is necessarily discharged, is impossible, and in this case there was an offer—or rather a direction—to do somewhat different work from that which she had been doing. What might have been the resulting position, if the lady had said: "I will work as a supervisor or I will not work at all," I do not stop to inquire. In point of fact, she did not say so. She said she was quite willing to work, and continued in the employment, not as an embossing operator but as a checker, and, so far as the case is stated, she appears not to have lost a day's work, but continued to work, de die in diem, from the date of the letter, and up to June 10, at all events, when she only ceased to work because she fell ill.

To my mind that is the whole of the matter, and my answer to the question asked by the learned magistrate, which is whether he came to a correct determination in point of law on the construction of the words of this article of the order, is that in my opinion he did not come to a correct decision. I do not agree with him that the meaning of the words "terminate . . . . the employment in the undertaking of any "specified person" is "terminate the employment or alter the "nature of the employment," and I think some such words would be required to justify the conviction of these defendants. I come to the conclusion, therefore, that the defendants, whether or not they may have offended against some other terms of this order, or against some other order, in what they did, did not terminate the employment in the undertaking of this lady by their letter of May 30. For those reasons I think the appeal should be allowed, and the conviction quashed.

WROTTESLEY J. I agree; and I agree with the reasons of the judgment just delivered. I should like to add only a few observations. Firstly, I do not think the authorities which have been cited to us in this case are of any service. They are in regard to reinstatement, which is a special question which does not arise in this case, for Mrs. Haag, never was, in the ordinary sense, turned out of the employment of the defendants, and therefore there was no breach of this article of the order, if we are to interpret it in the plain meaning of the words used. What the order says is that the person carrying on the undertaking shall not terminate (except for serious misconduct) the employment in the undertaking of a specified person; and for this purpose Mrs. Haag is a specified person. I think those words mean what they say—that what the defendants here could not do was to dismiss this lady, to use ordinary language, from their employment, or from the employment in the undertaking. If that be the proper meaning, that is exactly what this order forbids. It does not forbid the changing of the work on which any employee is employed, it does not prevent the termination of any particular contract of employment between employer and employee, or, as in many cases, it does not prevent them moving an employee from one type of job on to another type of job, or from one type of work on to another type of work, nor does it prevent them from moving an employee from one grade into another grade. Had the wider view which has been contended for by Mr. Lane Mitchell been the true view, I am bound to say that I should have expected some words to be used which an ordinary person would have understood to mean that the nature of a person's employment inside the undertaking was not to be varied or changed. No such words occur in this article. Moreover, if the view contended for on behalf of the Ministry of Labour be the true view, it is impossible to see why these words are used to create the alternative offence, " or without terminating such " employment cause him "—that is the specified person—" to " give his services in some other undertaking (except in case " of emergency for a period not exceeding fourteen days)." There would have been no need for those words, because quite obviously anything of that kind was already forbidden by the words " employment in the undertaking," construed in the way in which Mr. Lane Mitchell would have us construe them.

He was constrained, indeed, to say that on that construction every change from one type of work to another is a crime, if done without the permission of the national service officer. That is a startling proposition for which one would expect plain terms ; and it has to be borne in mind that this order creates a criminal offence and therefore is not lightly to be extended by the court. Nor is there not ample scope for the useful employment of this clause without construing it as contended for here on behalf of the Ministry of Labour. In its plain and ordinary meaning the provision is already salutary, and it prevents a real mischief. It prevents employers tempting away from one another employees by offering them more favourable terms of employment ; and sub-para. (*b*) of art. 4, para. (I.), which is quite obviously complementary to sub-para. (*a*), similarly prevents the employee running about and trying to extract more favourable terms of employment from other employers. Both those things, in times of emergency like these—and this is emergency legislation—lead to waste of time and fall in production. In addition, we all know that matters such as the proper terms and conditions which ought to be offered to employees are already looked after in other legislative provisions which are as well known as this one. On that view of the case, it will be seen that I regard art. 4, para. (I.) (*b*), as being a complementary provision to art. 4, para. (I.) (*a*), and there is therefore plenty of scope for the words in art. 4, para. (I.) (*a*), when read in their plain and natural meaning, without extending to them the meaning contended for by Mr. Lane Mitchell. There is no suggestion of mala fides here. When questions of mala fides arise, no doubt the court will be quite able to deal with the situation. There being nothing of that kind suggested, in my view the opinion expressed by the learned magistrate that the word " employment " here denotes not merely contractual relationship but work of a particular sort, so that an alteration of the employee's work was equivalent to terminating the employment, is a wrong opinion. I agree that the appeal ought to be allowed, and the conviction quashed.

TUCKER J. I agree. It is clear on the facts of this case that at all material times from April, 1943, when Doris Haag entered the employment of the defendants, down to June 10, the relationship of employee and employer subsisted, and the relationship of employee and employer in the particular undertaking. It may well be that during that time there may have been a termination of a contract of employment and the creation of a new contract, and there may have been, and probably was, an alteration in the nature of the work performed ; but at all material times, without any interval, the relationship of employee and employer was subsisting, and in the one particular undertaking. In those circumstances, it seems to me impossible to say that the employment in the undertaking of any specified person has been terminated. I agree that if it had been desired to prohibit and make criminal a transfer or alteration of this kind, clear words should have been used to bring about that result. I think it is impossible to hold that, on the wording of art. 4, para. (I.) (*a*), of this order, it has that effect, and I am of opinion that the learned magistrate came to an erroneous determination on this matter. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for defendants : *Swann, Hardman & Co.*
Solicitor for national service officer : *Solicitor to Ministry of Labour.*

W. L. L. B.

1945
Apr. 30.

Lewis, Oliver and Birkett JJ.

THE PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* HEPPELLS (1932), LIMITED.

Medicine—Retailer—" Article consisting of or comprising a substance " recommended as a medicine "—Label—Omission of appropriate designation of the substance, its active constituents or ingredients—Defence—No knowledge or reason to believe that the article consisted of or comprised such a substance—Pharmacy and Medicines Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 42), *s.* 11, *sub-s.* 1 (*a*) *; s.* 13, *sub-s.* 1 (*a*).

A chemist and druggist sold by retail an article consisting of or comprising a substance recommended as a medicine without there being written on the label the appropriate designation of one of the ingredients of which it was compounded. By s. 13, sub-s. 1 (*a*), of the Pharmacy and Medicines Act, 1941, it is a defence to a person charged under s. 11, sub-s. 1 (*a*), of that Act with selling by retail an article consisting of or comprising a substance recommended as a medicine unless there is written on the label the appropriate designation of the substance, its active constituents or ingredients, to prove that " he did not know and had no reason to believe that " the article consisted of or comprised such a substance." On an information under s. 11, sub-s. 1 (*a*), the chemist and druggist proved that he did not know and had no reason to believe that the article contained any ingredient other than those written on the label :—

Held that the defendants had established a defence under s. 13, sub-s. 1 (*a*), of the Act.

CASE STATED by a metropolitan police court magistrate.

The Pharmaceutical Society of Great Britain preferred an information against Heppells (1932), Ld. at a court of summary jurisdiction sitting at Bow Street, London, for that they did unlawfully sell an article, namely, " taxol," consisting of or comprising a substance recommended as a medicine, there not being written on the container or a label affixed thereto, the appropriate designation of the substance so recommended or of each of the active constituents thereof or of each of the ingredients of which it had been compounded, contrary to s. 11, sub-s. 1 (*a*), of the Pharmacy and Medicines Act, 1941 (1).

(1) By s. 11 of the Pharmacy and Medicines Act, 1941—" (1.) Subject to the provisions " of this Act, no person shall— " (*a*) sell by retail any article " consisting of or comprising a " substance recommended as a " medicine . . . . unless there is " written so as to be clearly legible " . . . . if the article is sold . . . . " in a container, on the container " or a label affixed thereto . . . . " —(i.) the appropriate designa- " tion of the substance so recom- " mended, or of each of the active " constituents thereof, or of each " of the ingredients of which it has " been compounded ; and (ii.) in a

At the hearing it was proved or admitted that the society have the duty of enforcing s. 11. The company carry on business as retail chemists and druggists at 26 Piccadilly, London, and elsewhere. On January 28, 1944, Fred. Cholerton Highfield, an inspector appointed by the society for the purpose of the Act, bought from the company at their shop in Piccadilly, in the course of his duty as such inspector, a pre-packed bottle of taxol tablets, a proprietary preparation, marketed by a firm known as Continental Laboratories, Ld. The tablets were labelled :

Taxol
Brand Tablets.
Physiological Treatment of Constipation.

Formula :

Intestinal Gland Ext.	0 gr. 05.
Biliary Extract	0 gr. 10.
Agar. Agar.	0 gr. 05.
Lactic Ferment.	0 gr. 05.

fiat tablet 0.35 grms.

Each of the tablets contained in addition to the ingredients named on the label a small but substantial proportion of aloes, a vegetable drug with a drastic purgative action, not properly described as a physiological process. The company sold the bottle of tablets intact and labelled precisely as they had purchased it by wholesale. They did not know and had no reason to believe that the tablets contained aloes, or any other active ingredient not named on the label. The company had sold taxol tablets for a number of years and were aware of the contents of the labels.

The society contended that (1.) the company must be deemed to have knowledge that taxol tablets consisted of or comprised substances recommended as a medicine and (2.) that under s. 13, sub-s. (1) (*a*), it was not a defence to prove that the seller

" case where the appropriate " designation of each of the active " constituents or the ingredients " is written as aforesaid, the appropriate quantitative particulars of the constituents or " ingredients . . . " By s. 13— " (i.) It shall be a defence for a " person charged with selling . . . . " in contravention of any of the " provisions of the last two preceding sections, an article consisting of or comprising a substance recommended as a medicine to prove—(*a*) that he did " not know, and had no reason to " believe, that the article consisted of or comprised such a " substance . . . . "

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of a substance recommended as a medicine did not know or have reason to believe that the substance comprised any ingredient other than those declared on a label. Section 13, sub-s. (1) (*a*), provided a defence only when the seller proved that he did not know and had no reason to believe that what was sold was recommended as a medicine.

The magistrate, while finding that the company had sold without disclosure of each of the active ingredients an article recommended as a medicine, was not satisfied that s. 13, sub-s. (1) (*a*), provided a defence only when the seller proved that he did not know and had no reason to believe that what was sold was recommended as a medicine. The company, he held, were entitled to be discharged by reason of the terms of s. 13, sub-s. (1) (*a*), and he dismissed the information.

R. A. Robinson for the society. The formula on the label of this substance recommended as a medicine was incomplete and an offence was committed by the company under s. 11, sub-s. 1 (*a*), of the Pharmacy and Medicines Act, 1941, unless they established a defence under s. 13, sub-s. 1 (*a*), of that Act. This they failed to do. The scheme of this Act is that the ingredients of a substance recommended as a medicine shall be fully disclosed on the label or container of the substance, and that the sale by retail of such a substance shall be restricted to categories of skilled persons who shall accept responsibility for what they sell. See ss. 11 and 12 of the Act and *Summers* v. *Roberts* (1). There is no provision in the Act requiring from the manufacturer of such a substance the disclosure of its active constituents or ingredients. The defence available to a retailer under s. 13, sub-s. 1 (*a*), is to prove that he did not know and had no reason to believe "that the article consisted of or "comprised such a substance." The defence is limited to the case where the seller proves that he did not know and had no reason to believe that what was sold was recommended as a medicine.

Lloyd-Jones for the company. If the contention for the society is correct an obligation is thrown on every authorized retailer to analyse in every case a substance recommended as a medicine. That cannot have been the intention of the legislature, though it is astonishing that there is no obligation under the Act on the manufacturer of a substance recommended as a medicine, or any procedure where some other person is

(1) [1944] K. B. 106.

responsible for the commission of the offence, such as that contained in s. 83 of the Food and Drugs Act, 1938. If a defence under s. 13, sub-s. 1 (*a*), is limited to the case where the retailer proves that he did not know and had no reason to believe that what was sold was recommended as a medicine, it is of no benefit to him. The defence under the sub-section is available where the retailer does not know and has no reason to believe that what was sold contained an ingredient which did not appear on the label.

R. A. Robinson replied.

LEWIS J. This case stated raises a short but rather intricate point under the Pharmacy and Medicines Act, 1941. It has been contended for the society that s. 13, sub-s. 1 (*a*), only affords a defence to a person charged with selling in contravention of ss. 11 and 12 of the Act, an article consisting of or comprising a substance recommended as a medicine, if he can prove that he did not know, and had no reason to believe, that what he sold was recommended as a medicine. I do not take that view and in my opinion it is a defence under the sub-section if the retailer proves, in the words of the sub-section, " that he did not know and had no reason to believe "—then in my own words—" that the article sold, in this case, taxol " tablets, contained an ingredient the appropriate designation " of which did not appear written on the container or its label." In my view the decision arrived at by the magistrate was right, and this appeal must be dismissed.

OLIVER J. I agree.

BIRKETT J. I am of the same opinion.

Appeal dismissed.

Solicitors for the society : *Ferris, Roberts, Thomas & Co.*
Solicitors for the company : *Lamartine Yates & Morgan.*

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May 10.

Humphreys and Tucker JJ.

PEEK *v.* TOWLE.

Justices—Motor car—Accident on road whereby a person, vehicle or animal, damaged or injured—Name and address not given to person reasonably requiring them—Obligation on driver to report accident to police—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *s.* 43), *s.* 22, *sub-s.* 2*; s.* 40, *sub-s.* 2.

Where owing to the presence of a motor vehicle on a road an accident occurs, whereby damage or injury is caused to any person, vehicle or animal, the obligation imposed on the driver of the motor vehicle by sub-s. 2 of s. 22 of the Road Traffic Act, 1930, to report to the police within the time specified in the sub-section, exists in every case where he has not given his name and address to a person who has reasonable grounds for requiring him to do so, whether or no he has been so required.

Case stated by justices for the county borough of Derby.

James Peake, the appellant, was an inspector of police and warrant officer for the county borough of Derby. Albert Edward Towle, the respondent, was the driver of a motor car, registered number BXA10, which at 12.20 p.m. on September 9, 1944, was involved in an accident, whereby a child was injured. At the time of the accident the respondent was not required to and did not give his name and address to anyone having reasonable grounds to require it, nor did he give the name and address of the owner or the identification marks of the vehicle, nor was he requested for the same by any person authorized to require the information. He did not report particulars of the accident to the police until 9.30 a.m. on September 13, 1944. On October 9, 1944, an information was preferred by the appellant against the respondent for that he being the driver of a certain motor vehicle, namely, a motor car, on a certain road called City Road, and an accident occurring whereby injury was caused to a person owing to the presence of the said motor vehicle on the road, and not having given his name and address to any person requiring him so to do, did fail to report the accident at a police station or to a police constable as soon as was reasonably practicable and in any case within twenty-four hours of the occurrence thereof, contrary to s. 22 of the Road Traffic Act, 1930 (1). The respondent contended

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(1) Road Traffic Act, 1930, s. 22: " (1.) If in any case, owing " to the presence of a motor vehicle " on a road, an accident occurs " whereby damage or injury is " caused to any person, vehicle or " animal, the driver of the motor " vehicle shall stop and, if required

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that no evidence had been given on behalf of the appellant that he had been required to give his name and address by any person having reasonable grounds for so requiring; that because he had not been so required he, the respondent, was under no obligation to report the accident under sub-s. 2 of s. 22 of the Road Traffic Act, 1930 (1); and that the circumstances proved by the evidence (if they disclosed any offence) should have been the subject of a charge under s. 40, sub-s. 2, of the Road Traffic Act, 1930 (1), and not under the sub-section as charged.

The justices held that the contention of the respondent was correct and dismissed the information. The appellant appealed.

Vernon Gattie for appellant. The words in s. 2 of sub-s. 22 of the Road Traffic Act, 1930; "If in the case of any such "accident as aforesaid" refer to the case put in sub-s. 1 of that section, where, owing to the presence of a motor vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal. By the terms of sub-s. 2 if in such a case the driver of the motor vehicle for any reason does not give his name and address to a person having reasonable grounds for so requiring, he must report the accident to the police within the time there specified. If the justices' construction were adopted and there was no person at the scene of the accident having reasonable grounds for requiring

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"so to do by any person having "reasonable grounds for so requiring, give his name and "address, and also the name and "address of the owner and the "identification marks of the "vehicle.

"(2.) If in the case of any such "accident as aforesaid the driver "of the motor vehicle for any "reason does not give his name "and address to any such person "as aforesaid, he shall report the "accident at a police station or to "a police constable as soon as "reasonably practicable and in "any case within twenty-four "hours of the occurrence thereof."

"(4.) If any person fails to "comply with this section he shall "be guilty of an offence."

Section 40, sub-s. 2: "If in "any case where, owing to the "presence of a motor vehicle "on a road, an accident occurs "involving personal injury to "another person, the driver of "the vehicle does not at the time "produce his certificate to a police "constable or to some person who, "having reasonable grounds for so "doing, has required its production, "the driver shall as soon as "possible, and in any case within "twenty-four hours of the occurrence of the accident, report "the accident at a police station "or to a police constable and "thereupon produce his certificate, "and if he fails so to do he shall "be guilty of an offence . . . ."

the name and address of the driver, there would be no obligation on the driver to report to the police, and that is absurd. Sub-section 2 of s. 40 of this Act deals with the case of failure by the driver of a motor vehicle after an accident involving personal injury to another person to produce his certificate of insurance to a police constable or some person having reasonable grounds for its production. In such a case the driver must report to the police within the time there specified. Whether on the facts of this case s. 40 is applicable, is immaterial. The decision of the justices was wrong.

Percy Lamb for respondent. The words of sub-s. 2 are explicit: " If in the case of any such accident as aforesaid "— that is where after such an accident as described in sub-s. 1— the driver of a motor vehicle has stopped and has been required to give his name and address, then, if " for any reason " he does not give his name or address " to any such person as aforesaid," he must report to the police. The obligation to report to the police is conditional on the driver having been asked by such a person, and for any reason having refused to give the required particulars.

TUCKER J. My Lord has asked me to deliver the judgment of the court. This case stated raises a short point. There is no question but that the driver of this motor vehicle was not required to give his name and address or any other information by any person having reasonable grounds for so requiring, or at all, and the argument on behalf of the respondent, the driver of the motor vehicle, is that sub-s. 2 of s. 22, which imposes the liability to report to the police, only arises in cases where the driver has been required by a person having reasonable grounds for so requiring to give his name and address, and that if he has not been so required by such a person, there is no obligation on him under this sub-section to report to the police. That argument is founded upon the words in sub-s. 2 " if in the case of any such accident as " aforesaid " and the words which follow " to any such person " as aforesaid." It is said that those words all indicate that what is being envisaged in the first instance is the driver having been required to give these particulars by a person having reasonable grounds so to require, and that it is only when he has been so required that it can be said that the words " in " the case of any such accident as aforesaid " apply, and similarly, that the words " to any such person " indicate some-

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one who on reasonable grounds has required these particulars to be given.

In our view these words are plain. The words are "in the "case of any such accident as aforesaid," and they mean where an accident has occurred whereby damage or injury has been caused to any person, vehicle or animal owing to the presence of a motor vehicle on a road. The sub-section then provides that in the case of any such accident as aforesaid, where for any reason the driver does not give his name and address to any such person as aforesaid, meaning the person described in sub-s. 1, then there is an obligation on him to report to the police. The best reason for not having given such particulars to any such person occurs when no such person is present at the scene of the accident, and in our view that is the kind of case which is envisaged, or one of the classes of cases which is envisaged, by this sub-section. It would be a remarkable state of affairs if when a driver has been involved in an accident in some lonely place, where nobody has been present to observe it, he should be under no obligation to report the accident at a police station, and that the obligation should only arise in cases where there has been some bystander who has asked for these particulars and where there has been a failure to comply with such request.

An argument is advanced, in support of the view taken by the justices, that such an occurrence as this could and should have been dealt with under s. 40. There is no need to express any view, one way or the other, whether or not s. 40 would have been applicable to this particular case. Section 40 deals primarily with the requirements as to the production of a certificate of insurance and with certain consequences which follow where there has been a failure to produce such a certificate, and it is not necessary for the purposes of this case to express any opinion with regard to that section. In our view it is clear on the facts found by the justices that there has been a breach of s. 22, and that the case should be remitted to the justices with the intimation that they should find the offence proved and adjudicate thereon.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for C. Ashton, Town Clerk, Derby.*

Solicitor for respondent: *G. A. Hathway, for J. P. R. Pym, Belper.*

C. G. M.

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May 2, 3.

MacKinnon, Lawrence and Morton L.JJ.

BERRIMAN *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Railway—Statutory duty—Fatal accident—Man at work on railway—Absence of look-out—"Permanent way men"—"Relaying or "repairing the permanent way"—Railway Employment (Prevention of Accidents) Act, 1900 (63 *&* 64 *Vict., c.* 27), *s.* 1, *sub-s.* 1 *; Sch. No.* 12*—Prevention of Accidents Rules,* 1902 (*St. R. & O.*, 1902, *No.* 616), *r.* 9.

The Railway Employment (Prevention of Accidents) Act, 1900, s. 1, sub-s. 1, authorized the making of rules with the object of reducing the danger incidental to railway service with respect to the subjects specified in the schedule which included "Protection "to permanent way men when relaying or repairing permanent "way." By the Prevention of Accidents Rules, 1902, r. 9, provision is made that "with the object of protecting men working "singly or in gangs on or near lines of railway . . . . for the "purpose of relaying or repairing the permanent way" the railway companies are to provide a good look-out and apparatus for giving warning against any train or engine approaching.

The plaintiff's husband was employed by the defendant railway in a group of four whose work was to look after the apparatus connecting signal boxes with signals and points in a particular area. This work included, when no specific defect was reported, the routine work of keeping the apparatus oiled. On December 27, 1943, the plaintiff's husband was run over and killed while doing the routine work on one of the lines. No look-out had been provided by the defendants nor was it the practice to provide one for men doing routine oiling :—

Held, that the defendants had committed a breach of statutory duty in failing to supply a look-out as required by r. 9 of the Rules of 1902. The plaintiff's husband was a "permanent way" man and engaged on the work of "repairing the permanent way" within the meaning of that rule.

APPEAL from Stable J.

The plaintiff was the widow of Frederick John Berriman, who was killed on December 27, 1943, while working for the defendants at West Parade Junction, Hull. The deceased was employed by the defendants as a labourer in a gang of four persons, the chief of whom was a signal fitter named Rowe. The gang served an area for mechanical work to the apparatus connecting signal boxes with signals and points worked from these boxes. If any faults or defects were reported they had to attend to them but they had also the routine work of oiling and cleaning apparatus. In the area where the accident happened the oiling and cleaning was usually done on Saturday.

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On Monday, December 27, 1943, Rowe and Berriman alone were at work, the other two members of the gang having a holiday. No oiling or cleaning had been done on the Saturday as it was Christmas Day, and no fault having been reported on the Monday, Rowe and Berriman occupied themselves with oiling and cleaning. While at work on the connexion to a point in a dangerous position on the railway lines, they were run over and killed by one of three passing trains, two going in one direction and one in the other. The plaintiff brought proceedings for damages under the Fatal Accidents Acts, 1846 to 1908, claiming that her husband had been killed while repairing the permanent way, within the meaning of r. 9 of the Prevention of Accidents Rules, 1902 (1), made under the Railway Employment (Prevention of Accidents) Act, 1900 (1), and that this happened in consequence of the defendants' breach of r. 9 in not providing a person or apparatus for maintaining a good look-out and giving warning when any train or engine approached.

At the hearing the evidence given included that of the chief engineers employed by the defendants and the London Midland and Southern Ry. Co. respectively. Their evidence was that the "permanent way" meant the ballast and sleepers, chairs, rails and fastenings carrying trains, that on both these railways there was a distinction made between permanent way men and the class of signal fitters, the permanent way men being the men who looked after the permanent way and the signal fitters being concerned with the apparatus working signals and

(1) By the Railway Employment (Prevention of Accidents) Act, 1900, s. 1:—(1.) "the Board of "Trade may, subject to the provisions of this Act, make such "rules as they think fit with "respect to any of the subjects "mentioned in the schedule to this "Act, with the object of reducing "the danger and risks incidental "to railway service." The schedule specifies twelve subjects and No. 12 is: "Protection to permanent way men when relaying "or repairing permanent way."

By the Prevention of Accidents Rules, 1902, r. 9: "With the "object of protecting men working singly or in gangs on or "near lines of railway in use for "traffic for the purpose of relaying "or repairing the permanent way "of such lines, the railway companies shall, after the coming "into operation of these rules, in "all cases where any danger is "likely to arise, provide persons "or apparatus for the purpose of "maintaining a good look-out or "for giving warning against any "train or engine approaching such "men so working, and the persons "employed for such purpose shall "be expressly instructed to act "for such purpose, and shall be "provided with all appliances "necessary to give effect to such "look-out."

points. Stable J. said that the question was whether r. 9 imposed a statutory duty on the defendants in relation to Berriman at the time and place, and in the circumstances existing when he was killed. The application of the rule was confined to men working for the purposes of "relaying or "repairing the permanent way." In his opinion the gearing and connexions from a signal box to the various signals and points were not part of the permanent way. If he was wrong as to that, the question arose whether Berriman was working for the purpose of relaying or repairing the permanent way. He and Rowe were carrying out the routine duty of oiling and cleaning the various connecting rods and points and in his view that work was not "relaying or repairing" within the rule. If the statutory duty had applied, it was not carried out; but there was no evidence of any breach of the rule or of any common law duty and the action must be dismissed. The plaintiff appealed.

Macaskie K.C. and *Charlesworth* for the plaintiff. There are two issues—whether the signalling system is part of the permanent way, and whether, if so, oiling and cleaning are "repairing" within the meaning of r. 9. As to the first question Stable J. took too narrow a view. It is submitted that "permanent way" includes everything attached to the ground in the vicinity of the lines, and necessary for the efficient working of the railway over the lines. [He referred to *Vincent* v. *Southern Ry. Co.* (1).] If it be accepted that the signalling apparatus is part of the permanent way, then oiling is a work of repair, restoring the apparatus after use to a condition for further use. The Shorter Oxford English Dictionary gives the following meanings for "repair": "To "restore (a composite thing, structure, etc.) to good condition "by renewal or replacement of decayed or damaged parts or "by refixing what has given way; to mend. To renew, "renovate (some thing or part); to restore to a fresh or sound "condition, by making up in some way for previous loss, waste, "decay or exhaustion." Oiling would come within those last words. [MACKINNON L.J. All those are works of cure: oiling is a work of prevention.]

It is necessary for keeping the system in working order to remove dirt that may have accumulated on the joints and wires, and to replace oil that has dried up, and that is as much a work

(1) [1927] A. C. 430.

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of repair as replacing a broken rod. It follows that r. 9 of the Prevention of Accidents Rules, 1902, applied and there has been a breach of the statutory duty to provide a look-out. [*Dredge* v. *Conway, Jones & Co.* (1) ; *Hutchinson* v. *London and North Eastern Ry. Co.* (2), also referred to.]

Beney K.C. and *Felix Denny* for the defendants. Rule 9 is narrow in regard to the class of men and the class of work to whom or to which it applies. The plaintiff's case appears to be that r. 9 applied because (1.) Berriman was engaged in repairing at the time of the accident ; (2.) he and Rowe were repairing part of the permanent way ; and (3.) they were permanent way men because so engaged. The defendants deny each of these contentions. First, the routine work of oiling is not repairing. Restoration is an essential element in repairing. There must be something out of order which requires repair. It is not as if the oiling was done because of any breakdown or defect. Reliance for the plaintiff has been put on *Vincent* v. *Southern Ry. Co.* (3) and, in particular, Avory J.'s summing up as set out in the House of Lords records. But in that case repairing was clearly being done.

[LAWRENCE L. J. Maintenance is so near to repair that it is difficult to distinguish between them.]

Stable J. was right in regard to the meaning of repair. Hitherto it has never been suggested that for the routine work of oiling a look-out is required.

Secondly, it is said that the work in question was being done on the permanent way and therefore that Berriman was a permanent way man. It is true that r. 9 does not use the expression " permanent way men " but the rules are made under the Railway Employment (Prevention of Accidents) Act, 1900, s. 1, and the material subject for which r. 9 is made is as set out in the schedule " Protection to permanent way men " when relaying or repairing permanent way." Rule 9 would be ultra vires if it was not limited in its application to permanent way men. Was the work being done " permanent " way " work ? Regard must be had to the meaning put on " permanent way " and " permanent way men " by the railway companies : see in this connexion *Unwin* v. *Hanson* (4). The argument for the plaintiff is that it would be ridiculous to say that anything so in contact with the permanent way as the signalling apparatus is not part of the permanent way;

(1) [1901] 2 K. B. 42.
(2) [1942] 1 K. B. 481.
(3) [1927] A. C. 430.
(4) [1891] 2 Q. B. 115, 119.

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but the evidence is that the permanent way means to railway men only the rails, chairs, sleepers and ballast, and that it does not include signal apparatus. The use of the expression "relaying or repairing the permanent way" is significant. Apparatus going to signals or points cannot be relaid while the permanent way in the narrow sense can be. It is impossible to say that Berriman was working on the permanent way. But even if he were, he was not a permanent way man. "Permanent "way men" are to the railways a recognized class as the evidence of the chief engineers of the defendants and of the London Midland and Scottish Ry. Co. clearly shows. The ruling of Avory J. as to the meaning of permanent way men as set out in the House of Lords records of *Vincent* v. *Southern Ry. Co.* (1) is erroneous and that question was not dealt with in the Court of Appeal or the House of Lords. Signallers and signal fitters are not within that class.

Charlesworth in reply. "Relaying and repairing" covers every operation in the operation of a railway and must be taken to include maintenance. To do a work of maintenance is to repair: *Proudfoot* v. *Hart* (2). Further it is too late to say r. 9 is ultra vires. Its application is not restricted to a narrow class.

MacKinnon L.J. The plaintiff brought her action against the defendants, alleging that her husband's death was caused by the breach by the defendants of a statutory rule contained in an order made by the President of the Board of Trade pursuant to the provisions of the Railway Employment (Prevention of Accidents) Act, 1900. [His Lordship read s. 1, sub-s. 1, of the Act, the twelfth of the subjects specified in the schedule and r. 9 of the Prevention of Accidents Rules, 1902, and continued]: The plaintiff's case is that her husband was a man in need of protection pursuant to r. 9, that the obligation to provide a person or apparatus for maintaining a good look-out to give warning against any train or engine approaching was not fulfilled, and that his death ensued by reason of the breach of that duty. If the rule did apply to Rowe and Berriman, the breach of the duty to provide a look-out is really not in dispute. There is no suggestion that anybody was appointed, and indeed the defendants avow that they do not regard people occupied in the duty in which Rowe and Berriman were engaged on this occasion as within the scope of this rule, and admit that no person or apparatus for the purpose of maintaining a good look-out was in fact provided.

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(1) [1927] A. C. 430.

(2) (1890) 25 Q. B. D. 42, 54.

The only question therefore is whether Rowe and Berriman on this occasion were within the category of "men working singly "or in gangs on or near lines of railway" within this rule. The work of the small gang of four persons was to look after the apparatus which connects signal boxes by rods, wires, and other connexions with signals and with the points of the various lines in this rather complicated junction, moved from the signal boxes. Any defect in the working of any part of the apparatus was reported and the gang's duty was to go to the spot where any defect occurred and set it right. But when not called for special repairs or adjustments, they had periodically to oil the various connexions. Rowe and Berriman were occupied on this routine oiling when the accident happened and there is no doubt that they were working on one of the lines of railway. The whole question is whether they were, when so working, within the scope of r. 9, so that persons or apparatus for looking out and giving warning of approaching trains had to be provided for their protection by the defendants.

The defendants' answer to the plaintiff's claim was twofold. First, they relied on the words in the schedule to the Act, speaking of "Protection to permanent way men when relaying "or repairing permanent way," and contended that where r. 9, in its opening words, says: "With the object of protecting "men working singly or in gangs on or near lines of railway "in use for traffic for the purpose of relaying or repairing the "permanent way of such lines," those words must be taken to have the same meaning as the passage in the schedule, and accordingly, that the rule was for the protection of permanent way men only. And it was argued that neither Rowe nor Berriman nor the gang to which they belonged were within the category of permanent way men contemplated by the Act and the rule. To establish that, reliance was mainly placed on the evidence of the chief engineer of the defendants and the chief engineer of the London Midland and Scottish Railway. The effect of that evidence was that in the arrangement of the staff of both those railways—and it can be said of all the English railways—there is a uniform distinction between permanent way men and other classes, including the class of signal fitters. Permanent way men, it was said, are all part of the engineering staff. They and also the signal fitters are subject to the supreme control of the defendants' engineer, but they are separate classes and those included in the class of signal fitters are not permanent way men. The permanent way men are those who do the tasks of what, I suppose, are more often called platelayers, men who look after the actual rails, the ballast underneath the sleepers, and the sleepers and chairs, either laying those component parts of the permanent way or repairing, or keeping them in order. The signal fitters, on the other hand, are a different class of men who are concerned with the signalling and point working apparatus; and it is said that though signal fitters may on occasion, and indeed frequently, be called upon to work at a place which anybody would call the permanent way, men of that class are not to be included in the description of "permanent way men."

The second contention is that even if this first contention is decided against the defendants, the operation of the rule is expressly limited by the words "for the purpose of relaying or "repairing the permanent way of such lines." It is said that nobody would suggest that Rowe and Berriman were relaying the permanent way; and that the work they were carrying out of what is called routine oiling, cannot properly be held to be within the words "repairing the permanent way."

I think that the defendants are wrong in both those contentions. As regards the first, I think it would be quite wrong to suppose that "permanent way men" in the schedule to the Act of 1900, or the phrase in the rule, "men working . . . . "for the purpose of relaying or repairing the permanent way," which may perhaps be taken to mean the same thing, referred to any particular class of workmen. I think it means people who are, within the ordinary meaning of the English language, engaged in work in a place which is part of the permanent way of a railway line. I do not suppose for a moment that when Parliament passed the Act with its schedule and referred to "permanent way men" they had in contemplation any technical division made by a railway company between the various classes of their workmen. I regard it as an ordinary phrase of the English language either to say "permanent way men" or "men working" on certain tasks on "the permanent way," and I think that on this particular occasion Rowe and Berriman were, in the language of the schedule, permanent way men, and were, within the language of the rule, working on the permanent way of the defendants' line. As to that, I have felt very little doubt.

I might perhaps mention that this point has been previously raised and discussed, though not in this court or in the House of Lords, in a preceding case. In *Vincent* v. *Southern Ry. Co.* (1), there was a somewhat similar claim by a widow under Lord Campbell's Act against the Southern Railway Company, arising under this rule. Part of the defence raised then, as appears from Mr. Schiller's argument at p. 105 in the House of Lords record, with which we have been supplied, was that you would have to go to a railway dictionary in order to determine what a permanent way man is, and he goes on to say: "The men themselves know it; it is a term used in the working "of railways, and their evidence is that they are not permanent "way men and would not class themselves as such; they class "themselves as signal fitters, signal installers, and so on, but "not permanent way men." That argument was met by Mr. Shakespeare in reply to a submission by Mr. Schiller for the defendants at the end of the plaintiff's case, that there was no case to go to the jury. In the material sentence of his argument, Mr. Shakespeare says: "A permanent way man "means a man employed upon the permanent way, and I "venture to suggest it would be impossible to say that a man "who is employed in doing anything which makes the rails "safe for the use of traffic is not a man who is employed on "the permanent way." On the submission by Mr. Schiller, Avory J. said: "I think there is evidence here which must be "left to the jury as to whether the death was caused by the "negligence of the railway company in not providing a look-"out man, and upon the construction of the rule, I am, as at "present advised, against you; I think that these men were "men within the meaning of the rule who were permanent way "men engaged in repairing." The jury found in favour of the defendants, if I remember aright, on the ground that the company had appointed a look-out and that the death of the deceased was due to the failure of that look-out man to do his duty, and was not due to any failure of the company to appoint a look-out. It went to the Court of Appeal and the House of Lords on the question whether that verdict absolved the defendants from liability, and the particular issue relating to the construction of the rule was not a matter of debate either in this court or in the House of Lords. However, so far as it goes, that expression of opinion by Avory J. does provide some authority which supports me in the conclusion that I have arrived at, namely, that Rowe and Berriman on this occasion were within the meaning of the rule—that, to use Avory J.'s language " these men were men within the meaning of the rule " who were permanent way men engaged in repairing."

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(1) Unrep. before Avory J. and the Court of Appeal; [1927] A. C. 430.

The remaining and, as I think, the more doubtful and difficult question, is whether the limitation in the rule of its application to men working on or near lines of railway " for the purpose of " relaying or repairing the permanent way " is sufficient to exclude these men from the benefit of the rule. They certainly were not relaying the permanent way, and the question remains whether they were repairing it. It is a nice point, but, on the whole, I think that they were repairing it within the meaning of the rule. It is said that " repair " means making good something which has gone wrong or is broken. Against that it is said that in effect repairing means maintaining in a state of efficiency. I think Mr. Charlesworth was justified in saying that you must read the word " repairing " with and having regard to its context. Its context is " relaying or repairing." Relaying, of course, is reconstruction ; " repairing," he suggests really means maintenance ; and I think it was I who suggested to him that there is a contrast between relaying and repairing similar to that between rebuilding and repairing.

On the whole I have come to the conclusion that the plaintiff is right in saying that her husband, who, as I have decided, was at the material time engaged in work on the permanent way, was, within the meaning of the rule, repairing the permanent way. In the result, the appeal succeeds, and there must be judgment in favour of the plaintiff for an amount which has been agreed at 1,500*l*.

Lawrence L.J. I agree. I only wish to add that Avory J. in summing up the case to the jury in *Vincent* v. *Southern Ry. Co.* said (1) : " It appears to me to be tolerably clear, at all " events, that Vincent and Stockwell "—those were the two signal fitters—" were men, working on the permanent way and " for the purpose of repairing the same, because the work that " they were doing was necessary to put the line in proper " working order." Those words seem to me to afford the true definition of what " repairing " in this rule means. I would also refer to *Dredge* v. *Conway, Jones & Co.* (2), where it was held that the whitewashing of a ceiling came within the

(1) House of Lords Record, 1926, p. 247.

(2) [1901] 2 K. B. 42.

definition "construction, repair or demolition" of a building, in the Workmen's Compensation Act. The court there, applying the principles laid down by the House of Lords in *Hoddinott* v. *Newton Chambers* (1), took the view that the words "construction, repair or demolition" were intended to cover everything in the life of a building; and I think that case supports the contention of Mr. Charlesworth, to which my Lord has referred, that the words "relaying or repairing the permanent way of "such lines" here are words which are intended to cover the whole of the work which is done in connexion with apparatus on the permanent way of a line, "relaying" referring to reconstruction, and "repairing" referring to the work of maintenance, which includes all the routine repairs which have to be done to put or keep the line in proper working order. For those reasons I agree with the judgment proposed.

MORTON L.J. Mr. Beney arranged his able argument for the defendants under three heads. First of all, he said that what Berriman was working on at the time when he met his death was not part of the permanent way within the meaning of r. 9; secondly, that even if it was part of the permanent way, Berriman was not a "permanent way man," notwithstanding that at the time he was engaged in working on the permanent way; and, thirdly, that if he was wrong on both of those points, Berriman was not doing "repair" within the meaning of the rule. MacKinnon L.J. has put the first two arguments together in his judgment, and they are of course very closely interconnected, but, as Mr. Beney divided them in the way I have stated, I should like to say a few words on each head separately.

In the first place, I have come to the conclusion that it would be far too narrow a construction of the words "permanent way" to say that they included, as the learned judge has held, only the ballast and sleepers, the chairs and the rails and fastenings which carry the trains. I think that that definition of "permanent way" really takes its origin from the division of the workers on the railway for administrative purposes, and for my part I cannot see why, for instance, a rod which is worked from the signal-box and operates on the points to shift them to the required position should not be a part of the permanent way. No one doubts that the points themselves are part of the permanent way. The second point, if indeed it is a

(1) [1901] A. C. 49.

separate point, is this. Mr. Beney says that although the words "permanent way men" do not appear in r. 9, the court ought to construe r. 9 as applying only to permanent way men, within the meaning of the twelfth heading in the schedule to the Act of 1900. He draws attention to the wording of s. 1, sub-s. 1, of the Act, which is as follows: "The Board of Trade may, "subject to the provisions of this Act, make such rules as they "think fit with respect to any of the subjects mentioned "in the schedule to this Act, with the object of reducing or "removing the danger and risks incidental to railway service," and then to the twelfth heading in the schedule which is: "Protection to permanent way men when relaying or repairing "permanent way." He suggests that in the schedule "permanent way men" cannot merely mean men who are engaged on relaying or repairing the permanent way, because if that were so the words would be wholly otiose and it would have been quite enough to say: "Protection to men when relaying or "repairing permanent way." He further submits that one ought so to construe the rule that it is within the powers which were conferred on the Board of Trade by the Act of 1900.

I feel that there is considerable force in that contention, but to my mind the words "permanent way men" do not bear the meaning which Mr. Beney asks us to attach to them. Assuming that r. 9 should be read as only applying to permanent way men within the meaning of the schedule to the Act of 1900, I should not be prepared to construe No. 12 of that schedule in such a way that it would depend upon the classification of their employees by railway companies whether they were or were not permanent way men. I do not think it was intended that the question whether a man was a permanent way man and protected by the rule or by the Act should depend merely upon such a classification. I think that "permanent way men" in No. 12 of the schedule to the Act means men whose duty is or includes working on the permanent way when such men are engaged on relaying or repairing the permanent way. On that construction, it may be that the qualification "permanent "way" might have been omitted from the schedule. But for my part I do not think that is a sufficient reason for confining the words to men who are classified as permanent way men by the officials of the railway. It is perhaps not without significance, though it has not affected my judgment either way, that those who framed the rules did not think fit to reproduce the words "permanent way men" in r. 9. I think that Berriman was a man whose duty it was to work on the permanent way, that the apparatus on which he was working at the time of his death was part of the permanent way, and that the first and second arguments put forward by Mr. Beney must fail.

As regards the question whether oiling is included within the word " repairing," as used in r. 9, I quite recognize that in the absence of any context indicating a wider meaning it might not be right to construe the word " repairing " as including oiling. As an example of the common uses of the word " repairing," I take the case of a man who is oiling his bicycle, either by inserting oil from an oil-can into the concealed parts in order to preserve them and make them work more smoothly, or by applying oil to the visible parts in order to preserve them from rust. If such a man were asked : " Are you repairing " your bicycle ? " I think he would reply : " No ; I am oiling " it." There are however contexts in which the word " repairing " can and should be construed so as to include oiling. In the present case Stable J. recognized this, for he said : " I do " not say that the operation of oiling does not sometimes fall " into the category of repair ; it might be that a particular rod " was reported as not functioning properly and repair or remedy " would be required, and the men told off to do that job, on " arrival at the defect, might find that the defect in functioning " was attributable simply to the fact that a certain amount of oil " was required, and it may be that that operation would " properly fall into the category of repair, but in this case " there is no evidence at all that anything was not " functioning properly ; in fact the evidence is that everything " was functioning properly. There has been no complaint " from anybody, and in my view these men conscientiously and " properly were filling in an otherwise slack afternoon by " carrying out the routine duty of applying oil to the moving " parts of the gear where required to keep it in good working " order, and I have come to the conclusion that that cannot " properly be brought within the rule, which is confined in its " application to men working for the purpose of relaying or " repairing, even if the gear from the signal-box to the points " can properly be described—as I think it cannot—as forming " part of the permanent way."

For my part, having regard not only to the context but to the purpose for which the Act of 1900 was passed and the rules of 1902 were made, I cannot construe " repairing " so narrowly as to exclude oiling altogether or to include it only to such a

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limited extent. In my view, "repairing" here includes "maintaining in good working order," and I agree that support to that view is given by the decision of this court in *Dredge* v. *Conway Jones & Co.* (1). It is true that in that case this court was directing its attention to the word "repair" as used in another Act, and no doubt there are dangers in applying observations made in those circumstances to the construction of the Act before us. There are, however, certain general observations which I think are of assistance. For instance, the Master of the Rolls said (2): "The conclusion to be arrived "at is that painting, as one of the operations to which a building is exposed, comes under the head of repair, and, if painting "does so, then equally whitewashing. As regards one thing "I should, for my part, make an exception, and that is that "I should not be disposed to consider that the doing of ornamental work was repairing within the meaning of the Act." Again, Romer L.J. said (3) in the same case: "The work that "was being done was of a substantial character, and was "required for the protection and maintenance of the building. "The case, therefore, comes within the principle laid down by "the House of Lords, and what was being done amounted to "repairing within the meaning of the statute."

I think these observations show clearly that in the view of the court work which is directed to maintaining and preserving a particular object may properly be considered as falling within the word "repairing" in a suitable context. I agree with the order proposed.

Appeal allowed.

Solicitors: *Pattinson & Brewer*; *Miles Beevor*.

(1) [1901] 2 K. B. 42.
(2) Ibid. 46.
(3) Ibid. 47.

H. C. G.

pplied. BANKS *v.* COPE-BROWN.
948] 2 All E.R. 76.

stinguished. LINDOP *v.* QUAIFE.
949] 1 All E.R. 456.

Applied. LLEWELLYN *v.* HINSON.
[1948] 2 All E.R. 95.

Followed. LLEWELLYN *v.* HINSON.
1948] 2 K. B. 385

Distinguished. MI
CHELL *v.* BARNES
[1950] 1 K. B. 44

COLE *v.* HARRIS.

Distinguished. BAKER *v.* TURNER.
[1950] 1 All E.R. 834.

1945

Apr. 27;
May 17.

MacKinnon,
Lawrence and
Morton L.JJ.

Landlord and tenant—Rent restriction—"Part of a house let as a separate "dwelling"—Sole use of three rooms by tenant—Joint use of other rooms with landlord and another tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.

In June, 1943, the defendant let to the plaintiff three rooms, consisting of bedroom, living-room and kitchen, on the first floor

Distinguished. MITCHELL *v.* BARNES.
[1949] 2 All E.R. 719.

Followed. HAYWARD *v.* MARSHALL
[1952] 1 Q.B. 89

Followed. HAYWARD *v.* MARSHALL
[1952] 2 Q.B. 89

of a dwelling-house, together with the joint use, with the plaintiff and the tenant of the second floor, of a bathroom and w.c., at a rent of 32*s*. a week.

On September 1, 1939, the plaintiff's three rooms were let to a tenant at 22*s*. a week. The house as a whole was freed from control by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and while so free was let in 1936 at 75*l*. a year. It had not been let on or since September 1, 1939, the defendant being the owner in fee simple:—

Held (by MacKinnon and Morton L.JJ., Lawrence L.J. dissenting) that there was a demise of the three rooms as a separate dwelling and not a mere sharing of the whole house. It was difficult to define, as a matter of legal principle, the dividing line between the two classes of case, but the most satisfactory formula seemed to be to say that if there was a sharing of essential *living* rooms (which would include the kitchen) there would not be a demise of the premises as a separate dwelling-house. Sharing of other than living accommodation, though such accommodation may be of a kind essential according to modern standards, would not necessarily prevent the letting being a demise of the premises as a separate dwelling, and it must be decided as a question of fact in each case.

Neale v. *Del Soto*, ante p. 144, distinguished and explained.

Held, also, by the whole court, that the standard rent of the plaintiff's rooms was 22*s*. a week, and that since the house as a whole was not, at the material time, within the Rent Restriction Acts, the standard rent was not to be arrived at by apportionment under s. 12, sub-s. 3, of the Act of 1920, nor under s. 5 of the Act of 1938.

APPEAL from Gloucester county court.

The plaintiff Cole was the tenant of a flat on the first floor of a house, No. 11 Belgrave Road, Gloucester, of which the defendant, Mrs. Harris, was the owner in fee simple. The house as a whole became de-controlled by the Rent and Mortgage Interest Restrictions (Amendment) Acts, 1933, and in 1936 was let for three years at a rent of 75*l*. per annum. That lease was later surrendered, and in April, 1939, the defendant purchased the freehold with vacant possession. She occupied the ground floor herself, and made certain alterations in the two upper floors (not amounting, as the county court judge found, to a " bona fide reconstruction by way of " conversion into two or more self-contained flats or " tenements "), in order to let them as separate flats. Each flat contained a living-room, bedroom and kitchen, of which the tenant had exclusive use, together with the use, jointly with the defendant and the other tenant, of a combined bathroom and W.C. on the first floor, and of the garden for drying clothes and storing coal. The first floor flat was first let to a Mrs. Ormerod on May 19, 1939, at 22*s.* a week, and it was so let on September 1, 1939. Mrs. Ormerod left in 1943, and the defendant, after making certain improvements in the first floor flat, let it to the plaintiff on June 16, 1943, at 32*s.* a week, including the joint use of the bathroom and W.C. and of the garden for the purposes named. The top flat was at all material times let to a tenant at 20*s.* a week, with similar joint user of bathroom, W.C. and garden.

The plaintiff, brought an action in the Gloucester county court, claiming that he was entitled to have the standard rent of the first floor flat determined by apportionment of the rent of the whole house, viz., 75*l.*, and to be repaid rent overpaid. The defendant claimed that the standard rent was 22*s.* at which the flat was let on September 1, 1939.

The county court judge came to the conclusion that *Neale* v. *Del Soto* (1) laid down the principle that "the sharing of any "part of the accommodation included in the tenancy contract "which is essential to the conception of a dwelling-house, according to ideas held at the present day, prevents the letting from "being a letting of a part of a house as a separate dwelling." In his view, the combined bathroom and W.C. was an essential part of the dwelling. He therefore decided that there was no demise to the plaintiff of "part of a house let as a separate "dwelling," but only a sharing of the use and occupation of the house. He gave judgment for the defendant, but intimated that, if he had found a demise of a separate dwelling, he would have held that the plaintiff was entitled to an apportionment of the rent of the whole house under s. 12, sub-s. 3, of the Act of 1920 and s. 5 of the Act of 1938. The plaintiff appealed.

Pritt K.C. and *H. G. Garland* for the plaintiff. The true position is that the defendant is in possession of the bathroom and that the plaintiff has a licence to use it in common with the defendant and the other tenant. *Neale* v. *Del Soto* (1) contains no principle, but merely an affirmation of a county court judge's finding of fact. In the present case the county court judge has misdirected himself in thinking that *Neale* v. *Del Soto* (1) laid down a principle which bound him. [They referred also to *Sutton* v. *Begley* (2); *Smith* v. *Prime* (3); *Field* v. *Gover* (4).]

(1) Ante, p. 144.
(2) [1923] 2 K. B. 694.
(3) (1923) 39 T. L. R. 403.
(4) (1943) 60 T. L. R. 164.

If there was a demise of part of the house as a separate dwelling, then the standard rent must be arrived at under s. 12, sub-s. 3, of the Act of 1920 and s. 5 of the Act of 1938 by apportioning the standard rent of the whole house, namely, 75*l.* per annum.

Diplock (*O'Sullivan K.C.* with him) for the defendant. The question whether in any particular case there is a letting of a separate dwelling or only a sharing of a house, is one of fact and this court cannot interfere with the finding in my favour. *Neale* v. *Del Soto* (1) does not decide this case, but there was ample evidence to support the judge's finding. If I am right on that point, no other arises, but in any event, s. 12, sub-s. 3, of the Act of 1920 and s. 5, of the Act of 1938, do not apply. They apply only where the whole house is let, and is itself subject to the Rent Restriction Acts. Here the only letting of the whole house was at a time when it was decontrolled, and there is no standard rent to apportion. The standard rent of the plaintiff's rooms is that at which they were let on September 1, 1939, namely 22*s.* a week.

Pritt K.C. replied.

Cur. adv. vult.

May 17, 1945. The following judgments were read:—

MACKINNON L.J. In this case the defendant was the owner of a house, No. 11 Belgrave Road, Gloucester. In June, 1943, she made an agreement with the plaintiff under which, in consideration of 32*s.* a week, the plaintiff was to have the exclusive use of three rooms on the first floor of this house, together with the right to use, in common with the defendant, and the occupant of the three rooms on the top floor, a bathroom containing a w.c. apparatus. The three rooms of which the plaintiff had the exclusive use were a sitting-room, a bedroom, and a combined kitchen and scullery. In his rooms were separate meters for gas and electric light. In January, 1945, the plaintiff began this action in the Gloucester county court. In effect, he alleged (*a*) that the three rooms were let to him as a separate dwelling within s. 12, sub-s. 2, of the Rent and Mortgage Interest (Restrictions) Act, 1920; (*b*) that under the Rent Restriction Acts the standard rent of the said separate dwelling was 12*s.* a week, and (*c*) that by virtue of s. 14, sub-s. 1, of the Act of 1920, as amended by s. 7, sub-s. 6, of the Act of 1938, and by the schedule to the Act of 1939, he was entitled

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(1) Ante, p. 144.

MacKinnon L.J.

to recover 20s. a week out of the 32s. a week paid to the defendant since June, 1943.

Many questions arising on this chaotic series of Acts were elaborately discussed by the county court judge in a careful judgment. I only propose to deal with one of them. The judge held that the plaintiff's claim failed because the three rooms were not let to him as a separate dwelling within s. 12, sub-s. 2, of the Act of 1920; and he came to that conclusion upon what he took to be the principle laid down by this court in *Neale* v. *Del Soto* (1). In my view, the decision in that case was rather upon the admitted facts than upon any principle of law. In so far as any such principle can be derived from it, I do not think it was correctly enunciated by the judge in the present case. In effect it was held in that case that there was no letting of part of the house as a separate dwelling, but an agreement by the plaintiff and defendant to share the house. As Morton L.J. said (2), the substance of the matter was that there was "a sharing of the house. Each party had the "exclusive use of some rooms and the two parties together had "the use in common of other rooms." These two contrasted sorts of agreement—(*a*) a demise of part of a house as a separate dwelling, and (*b*) an agreement to share the use of a house, are perfectly intelligible. Whether any particular agreement falls under (*a*) or under (*b*) is much more a question on the facts than of any rule of law. In *Neale* v. *Del Soto* (1) the judge found it was (*b*), and the Court of Appeal agreed with him. In this case I think on the admitted facts the arrangement fell under (*a*) and not under (*b*). The three rooms of which the plaintiff had exclusive use contained all the requirements of a separate dwelling with the sole exception of a w.c. Outside his three rooms he had the use of a w.c., and of a bath in the same room, and necessarily it was the exclusive use of that room at any time when the defendant or the other tenant were not exercising their right to its exclusive use. By contrast in *Neale* v. *Del Soto* (1) the alleged tenant shared the use, contemporaneously with others, of various rooms, including a common kitchen. The learned judge says, of *Neale* v. *Del Soto* (1): "The principle of the decision appears to me to "be that the sharing of any part of the accommodation included "in the tenancy contract which is essential to the conception "of a dwelling-house, according to ideas held at the present "day, prevents the letting from being a letting of part of a

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(1) Ante, p. 144.

(2) Ante, pp. 144, 147.

"house as a separate dwelling." I am clear that that was not the *principle* of the decision. The conclusion was that on the facts there was no demise at all, but an agreement by the owner of a house to take in a lodger, giving him the exclusive use of some of the rooms in the house, whereas, on the facts of this case I think the status of the plaintiff under his contract with the defendant was that of tenant under a demise, and not that of a lodger having the exclusive use of some rooms.

The only other point that is material in this appeal is: What is the standard rent of the part of the house let to the plaintiff as a separate dwelling? As to that I think defendant's counsel was right in saying that it is 22*s*. a week, the rate at which the defendant let it to Mrs. Ormerod in May, 1939. The defendant alleged this, alternatively, in para. 3 of her defence, and by a subsequent notice paid into court, with a denial of liability, 33*l*. 2*s*. 3*d*., which I presume is the difference between 32*s*. a week and 22*s*. a week. The plaintiff is entitled to recover upon that basis.

Since writing the above I have had the advantage of reading the careful and elaborate judgment of Morton L.J., who arrives at the conclusion I have expressed. It is one of the difficulties under these Acts that proceedings under them must always begin in the county court, and by other legislation a finding of fact by a county court judge is final. In one sense, the conclusion of the judge in this case that there was no letting of part of the house to the plaintiff as a separate dwelling may be regarded as a conclusion of fact. But he arrived at it by applying what he conceived (as I think erroneously) to be the principle of law laid down in *Neale* v. *Del Soto* (1). It is, I think, difficult to formulate any principle of law which separates what I have called the contrasted conceptions of (1.) a demise of part of a house as a separate dwelling, and (2.) an agreement to share the use and occupation of a house. But I think Morton L.J. provides the best formula by saying that to create (1.) there must be an agreement by which the occupier has the exclusive use of the essential *living* rooms of a separate dwelling-house. After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A w.c. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is.

LAWRENCE L.J. The principal question we have to decide is

(1) Ante, p. 144.

whether the county court judge has adopted the true test in applying the decision of the Court of Appeal in *Neale* v. *Del Soto* (1). The test which the county court judge did apply was that part of a house is not let as a separate dwelling within the meaning of s. 12, sub-s. 2, of the Act of 1920, where a part of the house so let, essential to it as a dwelling, was by the agreement to be shared with other tenants. It was not disputed that the effect of s. 7 of the Act of 1939, s. 16 of the Act of 1933, and s. 12 of the Act of 1920, is that the Acts only apply to parts of houses let as separate dwellings, but it was argued that the essential nature of the rooms shared is not the true test of whether such sharing prevents the letting being of a separate dwelling and that the true test is either one of degree or whether the part shared is substantial. In my opinion the county court judge adopted the right test. If an essential part of the house let is by the tenancy agreement to be shared, it is not, in my view, let as a separate dwelling. It does not appear to me to be an answer to say that people can dwell in a building without baths or lavatory accommodation. They can, of course, live without baths and they can make use of lavatories outside their dwelling, but if they choose to include in the tenancy agreement of what they contend is a separate dwelling the right to share a bathroom and lavatory, it appears to me that the premises let are not let as a separate dwelling. A single room can, of course, be let as a separate dwelling, but if the tenancy agreement includes for one rent a right to share other essential rooms it appears to me impossible to say that the letting is of a separate dwelling. The decision in *Neale* v. *Del Soto* (1) is binding on us and it must be accepted, therefore, for the purposes of this court, that the sharing of certain parts of a dwelling-house by the tenant with the landlord or other tenants prevents the dwelling being let as a separate dwelling.

What better test can there be then as to what part of the dwelling must be shared to render it not a separate dwelling than the essential parts ? And if this is the true test it must be a question of fact for the county court judge what parts are essential. Even if it were held to be a question of degree to be decided by the judge as a question of fact in each case, that would be no ground for reversing the judgment of the judge in this case, who has laid down a more stringent test. It has been suggested that this test, if applied to a staircase of which the tenants have the joint use, would exclude many parts of houses

(1) Ante, p. 144.

from the protection of the Acts, but in my opinion the true view is that the mere right to use a staircase along with other tenants or the landlord does not prevent the letting being of a separate dwelling. The exclusive use of the staircase is at no time essential to the use of the dwelling. Moreover, s. 12, sub-s. 9, of the Act of 1920, referring to self-contained flats, assumes that staircases may be common to dwellings controlled by the Acts.

Since writing this judgment I have seen the judgments of MacKinnon and Morton L.JJ. in which Morton L.J. adopts a test not suggested during the argument, namely, whether the room or rooms shared are what are sometimes called " living " rooms, and he finds that the bathroom and lavatory in question were not living rooms and, therefore, holds that sharing those rooms did not prevent the letting from being the letting of a separate dwelling. I regret that I am unable to agree with this view. It appears to me that the actual agreement between the landlord and tenant must be considered, and, if it provides for the letting of part of a house as a dwelling, it must be as a separate dwelling to come within s. 12, sub-s. 2, of the Act of 1920 ; and that if any part of what is let is essential to the use of the premises as a dwelling that part must be let to the tenant separately and not jointly with other persons.

For these reasons I am of opinion that the appeal should be dismissed. I concur in the views expressed by my brethren as to the standard rent of the premises if the Acts are applicable.

MORTON L.J. This is an appeal from a decision of Judge Wethered, sitting in the Gloucester county court, that certain rooms let to the plaintiff by the defendant were not a " dwelling-" house," within the Rent and Mortgage Interest (Restrictions) Act, 1939, and accordingly that certain claims by the plaintiff for apportionment of rent and repayment of rent overpaid must fail. [His Lordship stated the facts as set out in the judgment of the county court judge, and continued :] The judge decided that No. 11 Belgrave Road was at no time " bona fide recon-" structed by way of conversion into two or more separate and " self-contained flats or tenements within s. 12, sub-s. 9, " of the 1920 Act." There is no appeal from this decision, which was in my view clearly correct. Thus the questions for decision in this court are (1.) Did the plaintiff, on June 16, 1943, become tenant of property which was " part of a house let " as a separate dwelling " and was thus " a dwelling-house " within the definition in s. 16 of the Act of 1933, incorporated

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in the Act of 1939 by s. 7, sub-s. 1, of that Act? (2.) If so, is the plaintiff entitled (*a*) To have the standard rent of that property determined by apportionment; (*b*) To be repaid any part of the sums already paid by him as rent? The county court judge answered question (1.) in the negative and gave judgment for the defendant with costs. He intimated, however, that if he had answered the first question in the affirmative he would also have answered questions 2 (*a*) and (*b*) in the affirmative.

I now turn to question (1.). A similar question was recently considered by this court, in relation to other premises, in *Neale* v. *Del Soto* (1). That case turned on the construction of the identical words which appear in s. 12, sub-s. 2, of the Act of 1920. In that case the landlord of a house, Mrs. del Soto, had sublet to the tenant, Mr. Neale, two unfurnished rooms in a house containing seven rooms of which she was the lessee. The tenancy agreement provided for the use by the tenant, jointly with the landlord, of the garage, kitchen, bathroom, lavatory, coal-house and conservatory. In the course of my judgment, with which my brethren agreed, I said: "Were the "two rooms in question in the present case a part of a house "let as a separate dwelling? In my view they were not . . . . "The real substance of the matter was that there was a sharing "of the house. Each party had the exclusive use of some rooms "and the two parties together had the use in common of other "rooms . . . . It was suggested in the course of the argument "for the tenant that, if the county court judge's decision is "upheld, the result might follow that a letting of two rooms, "together with the use, in common with the landlord, of, for "instance, a W.C., would be outside the Act. I am content "to leave that matter to be dealt with if, and when, it arises, "but it may be—I express no view on the matter—that this "question is one of degree and, as the judge below observed in "his judgment, in the present case a very substantial part of "the dwelling was shared, including such a very important "room as the kitchen." In the case now before us there is no sharing of a kitchen and it seems to me that the true construction of the words "a part of a house let as a separate dwelling" must fall somewhere between two extremes. It cannot be that any sharing of any room, however unimportant, takes the property outside the operation of the Act. The words may be susceptible of that construction, but so to construe them would

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(1) Ante, pp. 144, 147.

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be to defeat, to a large extent, the purpose of the Act. For instance, take a case in which an entire floor of a house is let to a tenant, and there is no sharing of any room, except that the tenant is allowed, in common with the landlord, to store his boxes in an attic. It seems to me quite contrary to the intention of the Act to exclude from its operation a letting of this nature, where the tenant is, I think, "dwelling" in a "separate" part of the house.

Turning now to the other extreme, I think it is clear that a part of a house which is let to a tenant does not necessarily come within the Acts merely because the tenant has the exclusive use and occupation of one or more rooms. This was decided by this court in *Neale* v. *Del Soto* (1). It is, however, a matter of great difficulty to determine where the line should be drawn, so as to distinguish between a "sharing" of a house and a letting of part of a house as a separate dwelling. I do not doubt that the case of *Neale* v. *Del Soto* (1) fell clearly on one side of the line. There was a sharing of extensive accommodation, including the kitchen, and in fact the parties shared their meals in the kitchen and divided between them the work of preparing these meals. That fact does not appear in the report of the case, but we have been referred in the course of the argument to the notes of the learned county court judge, and this fact appeared quite plainly from the notes. However, even if the parties had not shared their meals, the court would have arrived at the same conclusion, and in fact the court did not rely upon this feature of the case. Since the case of *Neale* v. *Del Soto* (1) was decided, this court has had to consider the same point in relation to other premises, in the case of *Sharpe* v. *Nicholls* (2). In that case the defendant was the tenant of a house, and the county court judge ordered "that the defendant "do give the plaintiff possession of the said house on the 6th day "of April, 1945, subject to the plaintiff allowing the defendant "a Rent Act protected tenancy of the front two rooms, together "with the joint use of the kitchen and out offices. Rent to be "apportioned by Registrar failing agreement by the parties." There were other points in the case, but all the members of this court took the view that it was not possible for the defendant to have a Rent Act protected tenancy of the front rooms together with joint use of the kitchen and "out offices" having regard to the decision of this court in *Neale* v. *Del Soto* (1). The house in the case of *Sharpe* v. *Nicholls* (1) was a small cottage with two front rooms, two backrooms, and a kitchen and, what the county court judge described as " out offices." In my judgment I said " It is true that the case of *Neale* v. *Del Soto* (2) was " a decision upon the facts then before this court, but I think " that the result of such an order as was made by the county " court judge here would be (to quote *Neale* v. *Del Soto* (2)) " in substance a sharing of the house." *Sharpe* v. *Nicholls* (1) was also a case which turned upon its own facts, but the court recognized that the sharing of a kitchen and lavatory was sufficient to take the case out of the Rent Restriction Acts.

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(1) Ante, p. 144.

(2) Ante, p. 382.

In the present case the tenant, who has the exclusive occupation of three rooms, also has the right, in common with the landlord and the tenant of the upper flat, to use the combined bathroom and w.c. and also to use the garden for the purpose of drying clothes and storing coal. Does this fact prevent him from being the tenant of a part of a house let as a separate dwelling, and what is the test which should be applied in determining the question ? The matter is one of great importance, for no doubt the test adopted in this court will be used by county court judges in future in determining whether or not a particular letting does or does not fall within the Acts. The county court judge thought that " the sharing of any part of the " accommodation included in the tenancy contract which is " essential to the conception of a dwelling-house, according to " ideas held at the present day, prevents the letting from being " a letting of part of a house as a separate dwelling." He thought that this was the principle, the ratio decidendi, of the decision in *Neale* v. *Del Soto* (2). He added that " sharing " of non-essential parts of the accommodation may be a " question of degree," but in his view the combined bathroom and w.c. was an essential part, and the sharing of that essential part took the present case outside the Acts.

I do not think that *Neale* v. *Del Soto* (2) laid down any principle, and I am not prepared to accept the test suggested by the learned judge. I recognize that this test is one which might well be adopted and it is approved by one of my brethren. The objection to it is, to my mind, that it unduly restricts the operation of the Rent Restriction Acts, having regard to the scheme of the Acts as a whole. There can be no doubt that if a dwelling-house includes a w.c., the w.c. is a part of the accommodation which is essential, according to ideas held at the present day.

(1) Ante, p. 382.

(2) Ante, pp. 144, 147.

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Nevertheless, I do not think that the legislature intended that the sharing of a w.c. with the landlord or with others should be sufficient to prevent a letting of rooms from being a letting of part of a house as a separate dwelling within the meaning of the Acts. I suspect that there are very numerous cases all over the country where two or more families each occupy a separate set of rooms, and the lavatory accommodation is shared in common, and I cannot believe that the legislature intended to exclude all such cases from the operation of the Acts. If the legislature had used words which would only bear this construction, if fairly construed, we should have had to give the words this construction, and leave it to the legislature to pass fresh legislation if it thought fit. In my view, however, the words are fairly open to another construction. I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as "living rooms" or "dwelling rooms." To my mind a kitchen is fairly described as a "living room," and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling. In many households the kitchen is the principal living room, where the occupants spend the greater part of the day. Very often it is the warmest part of the house and the family tend to congregate there for that reason. On the other hand, both the bathroom and the w.c. are rooms which are only visited on occasions for a specific purpose, and I think they may fairly be classed with such a room as a box-room, though no doubt it is not visited so often. I think that this test gives a reasonable construction to the Acts, and one which is in accordance with their general scheme and intention.

Applying this test to the letting to the plaintiff in the present case, I think it is clear that a part of the house has been let to him as a separate dwelling within the meaning of the Acts. He has the exclusive possession and use of a bedroom, a kitchen and a sitting room. He does not share any living room with other people, though there are certain valuable conveniences which he shares with other people, namely, the use of the combined bathroom and w.c. and the use of the garden for the purpose of drying clothes and storing coal. The county court judge seems to have felt some doubt whether there was a

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demise to the plaintiff of the combined bathroom and W.C. subject to the rights reserved to the landlord and the tenant of the top floor to use it in common with the plaintiff, or whether there was an irrevocable licence to the plaintiff to use the combined bathroom and W.C., and also the garden (for the purposes already mentioned) in common with the other occupiers. In my judgment our decision should be the same, whatever may be the true view on these points. In either case, the plaintiff does not share any living room with other people. The result is that, in my view, the county court judge arrived at the wrong conclusion on the first question arising on this appeal. The flat which was let to the plaintiff on June 16, 1943, was " part of a house let as a separate dwelling " and was thus a " dwelling-house " within the meaning of the Act of 1939.

I am fortified in the conclusion to which I have come by a further consideration of the cases of *Smith* v. *Prime* (1) and *Sutton* v. *Begley* (2). The former case, decided by Roche J. (as he then was) on April 17, 1923, was cited to this court in *Neale* v. *del Soto* (3); the latter case, decided by this court on May 2, 1923, was not so cited.

Smith v. *Prime* (1) was a decision on s. 12, sub-s. 9, of the Act of 1920 and is, therefore, not directly in point. In that case a house had been converted into two flats. Each flat had its own kitchen and its own gas and hot water system. There was no provision of any physical means of separation between the two flats, but the only common user was of the staircase and of a closet and bathroom, divided from one another by a partition, on the half-landing between the lower and upper flats. " That " sanitary and bathroom accommodation," said the learned judge, " was enjoyed equally and in common by the occupier of " both the lower and the upper flat." It was held that these two flats were " separate and self-contained flats " and Roche J.'s reasoning is reported as follows: " On these facts, " he had come to the conclusion that the absence of a partition " was not fatal to the claim that these flats were separate. " Separate, in his judgment, meant not separated physically, " or partitioned off, but meant rather distinct, and just as, in " his view, to put in a partition would not by itself constitute " a bona fide reconstruction by way of conversion into separate " flats, so as to bring a case within the sub-section, so the " absence of a partition where one found a bona fide recon-

(1) 39 T. L. R. 403.
(2) [1923] 2 K. B. 694.
(3) Ante, pp. 144.

"struction which did result in the flats being distinct from one "another, so as to be capable of being held as separate and "distinct dwelling-houses, did not prevent them from coming "within the section, so far as the word 'separate' was con"cerned." This reasoning is directed to the construction of a sub-section different from that which is now before us, but it is interesting to observe that Roche J. thought that premises could be a "separate flat" even if the occupant shared a closet and bathroom with other persons.

In *Sutton* v. *Begley* (1) it was clear that the dwelling-house—a large house in Leamington—had not been "reconstructed" within s. 12, sub-s. 9, of the Act of 1920. Two spinster ladies had taken a lease of it in March, 1921, for a term of five years. The house contained nineteen rooms, two lavatories, a bathroom and a large basement with a garden in front and at the back. By a written agreement of July 11, 1921, they let to one Sutton "All those four rooms, thereinafter called the said "premises, on the ground floor of York House with the "fixtures and fittings together with the use jointly and in "common with the landlords and other tenants of other parts "of York House of the entrance hall leading to the said "premises, the use of the water closet on the ground floor, the "right to use the basement, kitchen and scullery in common "with all persons to whom the landlords might have granted "or might thereafter grant the like right, the right in common "as aforesaid to use the bathroom on the second floor at all "reasonable times, and the use of the garden in front of the "said premises, to hold the same for the term of three years "from May 24, 1921, at the yearly rent of 80*l*. per annum "payable as therein mentioned." Counsel for Sutton, the appellant, appears to have assumed, as a point requiring no argument, that the premises let to Sutton were a dwelling-house to which the Act of 1920 applied, and he directed his argument to other points. His opponent was not called on to argue, so one cannot tell whether or not he would have argued to the contrary. This court proceeded to give judgment on the footing that Sutton's premises were a dwelling-house to which the Act of 1920 applied, and decided a point which does not arise in the present case. That case is not an authority on the question before us, and counsel's assumption was ill-founded, having regard to the decision in *Neale* v. *Del Soto* (2), but it is interesting to note that it did not occur to any member of this court that the sharing of accommodation in that case took it outside the Act. I suspect that, since these two cases were heard twenty-two years ago, thousands of premises have been treated as being " let as a separate dwelling " within the Acts, where there was a separate letting of certain rooms together with the use, in common with other persons, of a W.C. with or without a bathroom.

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(1) [1923] 2 K. B. 694.

(2) Ante, p. 144.

As a result of my view that the plaintiff's flat is a dwelling-house within the Act of 1939, it becomes necessary to consider question 2 (*a*), that is, whether the plaintiff is entitled to have the standard rent of his flat determined by apportionment under s. 12, sub-s. 3, of the Act of 1920, as amended by s. 5 of the Act of 1938. The county court judge held that the plaintiff was so entitled, if his flat was a dwelling-house within the Acts, but I have arrived at a different conclusion. In my view the standard rent of the plaintiff's flat is fixed at 22*s*. per week by the provisions of s. 12, sub-s. 1, of the Act of 1920, as applied to houses brought within the operation of the Act of 1939. So applied, the sub-section reads as follows, so far as material : " The expression ' standard rent ' means the rent at which the " dwelling-house was let on September 1, 1939, or, where " the dwelling-house was not let on that date, the rent at " which it was last let before that date, or in the case of a " dwelling-house which was first let after the said September 1, " 1939, the rent at which it was first let." I have already arrived at the conclusion that the plaintiff's flat was a dwelling-house within the Acts. On September 1, 1939, the position was that this dwelling-house was let to Mrs. Ormerod on a weekly tenancy at 22*s*. per week. Thus the standard rent is 22*s*., and the remainder of the sub-section does not apply.

In my view neither s. 12, sub-s. 3, of the Act of 1920, nor s. 5 of the Act of 1938 applies to the present case. At the present moment the flat let to the plaintiff is a dwelling-house to which the Act of 1939 applies, but the whole house, No. 11 Belgrave Road, is not a dwelling-house to which this Act applies. It is true that the rateable value of No. 11 Belgrave Road is within the maximum stated in s. 3, sub-s. 1, of the Act of 1939, but at the present moment No. 11 Belgrave Road is not a " dwelling-house " within the definition contained in s. 16 of the Act of 1933, which is incorporated in the Act of 1939. It is not, and was not when the Act of 1939 came into force, a house *let* as a separate dwelling. For some time before the Act of 1939 came into force, the defendant was the owner of the whole house, which was then free from control, and she had elected to let out parts of the house instead of letting the house as a whole. The whole house is at the moment outside the Rent Restriction Acts.

Bearing these facts in mind, I turn first to s. 12, sub-s. 3, of the Act of 1920. That sub-section is as follows: "Where, "for the purpose of determining the standard rent or rateable "value of any dwelling-house to which this Act applies, it is "necessary to apportion the rent at the date in relation to "which the standard rent is to be fixed, or the rateable value "of the property in which that dwelling-house is comprised, "the county court may, on application by either party, make "such apportionment as seems just, and the decision of the "court as to the amount to be apportioned to the dwelling-"house shall be final and conclusive." It is to be observed that this sub-section only comes into operation where, for the purposes therein mentioned, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed. In the present case there is no necessity whatever for apportioning that rent. The plaintiff's flat was let at a rent of 22*s*. on September 1, 1939, while the house of which it forms part was not then and is not now "let" as a separate dwelling. Thus, as I have already pointed out, the standard rent of the plaintiff's flat is fixed at 22*s*. I now turn to s. 5 of the Act of 1938, which is as follows: "Where a dwelling-house to "which the principal Acts apply is part of another dwelling-"house to which those Acts apply, the standard rent of the "first-mentioned dwelling-house as from September 29, 1938, "shall be a standard rent ascertained by apportioning the "standard rent of the second-mentioned dwelling-house, "and sub-s. 3 of s. 12 of the Act of 1920 shall apply accordingly "notwithstanding that the first-mentioned dwelling-house "was let as a separate dwelling on or before August 1, 1914, "or on or before the date on which the second-mentioned "dwelling-house was first let." The present case is excluded from this section (assuming that this section would otherwise apply) because the plaintiff's "dwelling-house" although it is a dwelling-house to which the Act of 1939 applies, is not part of another dwelling-house "to which those Acts apply." For the reasons which I have already stated, No. 11 Belgrave Road is not, at the moment, a dwelling-house to which the Rent Restriction Acts apply, and therefore this section has no application to the present case. I think the county court

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judge, in arriving at the contrary conclusion, may have failed to notice that in the case of *Field* v. *Gover* (1) the whole house was "let" on September 1, 1939, and was thus a dwelling-house to which the Acts applied.

The result is that although in my view the plaintiff has succeeded in his arguments that his flat is a dwelling-house protected by the Acts, he has failed in his claim for apportionment of the rent. I answer question 2 (*b*) stated above, by saying that the plaintiff is entitled to repayment of any rent paid in excess of 22*s*. a week.

Appeal allowed.

Solicitors for plaintiff: *Wrinch & Fisher, for Langley-Smith & Sons, Gloucester.*

Solicitors for defendant: *Armitage, Chapple & Co., for Madge, Lloyd & Gibson, Gloucester.*

(1) 60 T. L. R. 164.

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Pensions—Pensions appeal tribunal—Appeal from decision of Minister—Evidence before quasi-judicial tribunal—"Statement of the case," containing reasons of Minister for his decision—Information given by medical member of tribunal to his colleagues—Pensions Appeal Tribunals Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 39), *s.* 6—*Pensions Appeal Tribunals* (*England and Wales*) *Rules,* 1943 (*St. R. & O.*, 1943, *No.* 1757, *L*/39), *pars.* 5, 12.

The disease of schizophrenia, which led to the discharge of a soldier as medically unfit during war service, was not noted in a medical report made on him at the commencement of his war service. By art. 4 (3.) of the Royal Warrant, therefore, he was entitled to a certificate that his disablement was due to disease which was attributable to his war service, or existed before, or arose during, war service and was and remained aggravated thereby, unless the evidence showed that these conditions were not fulfilled, the onus of proving which, by art. 4 (2.), lay on the Minister of Pensions. The Minister rejected the soldier's claim and he appealed to a pensions appeal tribunal. By r. 5 of the Pensions Appeal Tribunals (England and Wales) Rules, 1943, the "statement of the case," which is sent by the Minister to the appellant and the tribunal, must set forth (*a*) the relevant facts relating to the appellant's case, as known, to the Minister, including the medical history of the appellant and (*b*) the Minister's reasons for making the decision against which the appeal is brought. The tribunal was advised by its medical member that the reasons set out by the Minister in " the statement of the case " were, in his opinion, correct; that in his experience the disorder of schizophrenia was no more prevalent amongst service personnel than amongst civilians; and that there were no conditions in the service of the appellant on the East coast of England, in the Royal Artillery, manning a gun in an anti-aircraft unit and doing duty during air raids, which would render probable the contention that his service conditions caused or aggravated his disability. The tribunal dismissed the appeal. On a case stated, it was found that the tribunal's decision was based either on their acceptance of the Minister's reasons for his decision as evidence, coupled with their medical member's advice thereon or on the advice of their medical member given on the undisputed facts as set out in the first part of " the statement of the case " and, further, that unless one or other of those bases for their decision could be justified, the remaining material in the case was insufficient to discharge the onus which lay on the Minister:—

Held, that, although the tribunal was entitled to receive the relevant facts set out in " the statement of the case " as prima facie evidence of the correctness of the facts so stated, they were not entitled to receive that part of " the statement " which consisted of the Minister's reasons for his decision, being, in effect, the judgment under appeal, as evidence of the correctness of any relevant facts or matters of expert opinion contained therein. Moreover, evidence adduced before either judicial or quasi-judicial tribunals should consist of oral statements or documents communicated to both parties before the tribunal arrives at a decision. Information communicated by the medical member to his colleagues on a pension appeal tribunal during their deliberations did not fulfil that requirement.

Case stated by a chairman of a pensions appeal tribunal under s. 6 of the Pensions Appeal Tribunals Act, 1943.

The following facts were found by the tribunal on evidence the sufficiency of which was not in dispute. The appellant, Reginald Charles Moxon, was called up on November 11, 1940, and placed in grade 2. Eleven days later, he was placed in category B. 1. He served as a gunner in the Royal Artillery until his discharge on June 8, 1943. From December 12, 1940, to February 2, 1942, he served with an anti-aircraft unit on the East coast and did duty during air raids. On February 9, 1943, he was admitted to hospital and diagnosed as suffering from simple schizophrenia. The disability on account of which he was discharged on June 8, 1943, was schizophrenia, which was not noted on his medical examination on enlistment. Before joining the army he had not been absent from work

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except for minor ailments. Apart from his period of service on the East coast there were no other conditions causing strain to the appellant, mental or otherwise.

With regard to his service on the East coast the appellant had supported his claim by a written statement in which he said: " The whole reason for my present mental debility and " instability is the nervous effect of my experiences during my " army service. Previous to my army service I had not experienced any cause for anxiety or worry such as would lead " to mental debility and instability which now disables me from " work, and previous to such army service I led a normal " healthy and active life. For one period of my army service " I was stationed on the East coast and there for some considerable time suffered considerable strain by reason of the " duties which were necessary during air raid attacks. For " some weeks my unit, a heavy anti-aircraft unit, was on duty " day and night with very little rest and this subjected me to " physical and mental strain such as I had never experienced " or had to contemplate in civilian life." This statement was forwarded to the officer under whom the appellant had served on the East coast and he was asked whether he could confirm it. His reply was as follows: " In so far as he would never " experience the same in civilian life, most certainly. As to " the strain caused, it is impossible to say. As an ordinary " gun number he would man during air raids and when this " manning a gun at night robbed a man of his sleep he would " make it up during the day. There was no undue period ' of successive air raids which would call for strain whilst he was under my command." No oral evidence was given before the tribunal, nor was the appellant present. He was represented by counsel. All the above facts were found by the tribunal from the " statement of the case," or documents submitted therewith, prepared by the Minister under r. 5 of the Pensions Appeal Tribunals (England and Wales) Rules, 1943 (1), and sent by him to the Pensions Appeal Office, after copies had been supplied to the appellant. The appellant put in an " answer " to the " statement of the case " in these terms : " (*a*) The facts in the ' statement of the case ' which I " dispute are as follows : I dispute the statement of the " commanding officer of my unit that there was any oppor- " tunity to make up lost sleep during the day and I say that I " was subjected to undue strain during the period mentioned " in my ' notice of appeal '. "

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(1) By the Pensions Appeal Tribunals (England and Wales) Rules, 1943:

5. (" Statement of the Case and " Answer ")—

(1.) Subject to the provisions of r. 6 and r. 9, the Minister " shall, " on receipt by him of a notice of " appeal, prepare a document (to " be called a ' statement of the " ' case ') setting forth—(*a*) the " relevant facts relating to the " appellant's case as known to the " Minister, including the medical " history of the appellant; and " (*b*) the Minister's reasons for " making the decision against " which the appeal is brought.

The reasons for the Minister's decision as set out in his " statement of the case " were as follows :—

" (2.) When the statement of " the case has been prepared, the " Minister shall send two copies " to the appellant and shall inform " him that he may, if he so desires, " submit (on a form to be supplied " by the Minister) an answer to " the statement indicating— " (*a*) whether, and in what respect, " the facts in the statement of the " case are disputed ; (*b*) any fur- " ther facts which, in his opinion, " are relevant to the appeal ; and " (*c*) his reasons for thinking that " the decision of the Minister was " wrong.

" (3.) Where the appellant sub- " mits an answer disputing any of " the facts in the statement of the " case or putting forward further " facts, he shall attach to his " answer such documentary evi- " dence in support of his case as " is in his possession or as he can " reasonably obtain.

" (5.) The Minister may, if he so " desires, comment in writing on " the appellants' answer and, if he " does so, the Minister shall send " a copy of his comments to the " appellant.

" 12. (' Evidence '.)

" (1.) The appellant may give " evidence in support of his appeal " and the appellant and the " Minister may, subject to the " provisions of the next following " paragraph, call a doctor or any " other witness, and may produce " at the hearing any further docu- " mentary evidence not already in " the possession of the tribunal.

" (2.) Where the appellant or " the Minister intends to call a " doctor as a witness at the " hearing, he shall, unless he has " already notified the Pensions " Appeal Office of his intention to " call the witness, send notice of " his intention to the Pensions " Appeal Office not less than " seven days before the date fixed " for the hearing, and the Pensions " Appeal Office shall notify the " Minister or, as the case may be, " the appellant who shall then be " entitled to call a doctor at the " hearing without giving notice.

" (4.) The tribunal may summon " before it expert or other wit- " nesses.

" (5.) The tribunal shall not " refuse evidence tendered to them " on the ground only that such " evidence would be inadmissible " in a court of law.

" (6.) Subject to any direction " given by the President under r. 6 " or by the chairman under r. 15, " every document tendered in " evidence or considered by the " tribunal for the purposes of the " appeal shall be made available " to the appellant or his repre- " sentative (if any) and to the " Minister or his representative in " such manner as the tribunal " may direct."

"The appellant was Grade 2 on examination for enlistment "in August, 1940. He joined for duty in November, 1940, "when his medical category was stated to be B. 1, and served "until September, 1941, when he was admitted to hospital for "mild mastitis. Thereafter no incident is recorded until "hospitalization in February, 1943, when he was admitted with "a history of being extremely confused and disorientated for "time and place. He was stated to have been inefficient at his "army duties and was described as slow mentally and "physically. Investigations established a diagnosis of schizophrenia, but little improvement could be effected, as he "refused electric convulsive therapy and discharge from the "service to the care of relatives was advised. Schizophrenia "is a common mental disorder of constitutional origin, which "characteristically manifests itself without regard to external "circumstances. In the experience of the Ministry the disorder is no more prevalent amongst service personnel than "amongst civilians. In this case it is claimed that the condition was brought about by duties during air raid attacks, "but the report of the officer commanding unit on M.P.T. 23 "does not indicate that undue stress was experienced during the "period in question. He left the East coast in February, 1942, "and it was not until a year later that his mental illness became "apparent. In the Ministry's view nothing occurred in "service which can be held to have precipitated the condition "or contributed to its worsening and the Ministry is unable to "certify that Mr. Moxon's disorder was either caused or its "progress accelerated by any war service factor."

The tribunal said in dealing with the Minister's decision in "the statement of the case":—"Apart from the medical "evidence in hospital reports which suggest the diagnosis "of schizophrenia which we accept as correct, there is no "medical evidence on the side of the Minister of Pensions to "say that this disease could not be caused or aggravated by "the matters relied on by the appellant. All that there is on "that subject is contained in the decision of the Ministry and "Mr. Mitchison for the appellant contends that that is not "evidence. There is something to be said for this contention. "The decision is not signed by anyone and its writer remains "anonymous and the opinion given cannot be tested in the "ordinary way and is unsupported by evidence documentary "or oral. It is not evidence in the strict sense but pensions "appeals tribunals are not bound by the ordinary rules of "evidence and evidence is not to be rejected because it would "not be admissible in a court of law, and the decision, being "under review, the reasons for it are also, and it is the duty of "the tribunal to say whether they are correct, and this being "purely a medical question the tribunal has the benefit of the "wide experience of its medical member whose functions are "not merely to explain the meaning of surgical and medical "terms but to give his opinion generally."

The tribunal was of opinion that:—

(1.) "Evidence" referred to in art. 4 (3.) of the Royal Warrant (1) means any evidence or material and is not restricted to medical evidence only. Evidence showing the conditions under which an appellant served, severe or otherwise, is evidence within the meaning of that article. (2.) It is entitled to regard the reasons given by the Ministry of Pensions in its decision set out in the statement of the case as no less evidence than are the comments of the Minister made under r. 15. In *Irving* v. *The Minister of Pensions* (2) it was held by the Lord Justice Clerk that the tribunal was entitled to have regard to those comments as evidence in the case. (3.) The medical member of the tribunal is charged with the duty to

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(1) By the Royal Warrant: Art. 3:—"*Basic condition of "awards.* Under this Our "Warrant awards (other than an "award under art. 20) may be "made where the disablement or "death of a member of the mili- "tary forces is due to war service."

Art. 4:—"*Entitlement.* (1.) The "disablement or death of a "member of the military forces "shall be accepted as due to war "service for the purposes of this "Our Warrant, provided it is "certified that—(*a*) the disable- "ment is due to a wound, injury "or disease which—(i.) is attri- "butable to war service; or "(ii.) existed before or arose "during war service and has been "and remains aggravated thereby. "(2.) In no case shall there be an "onus on any claimant under this "Our Warrant to prove the fulfil- "ment of the conditions set out in "para. 1 of this article and the "benefit of any reasonable doubt "shall be given to the claimant. "(3.) Where an injury or disease "which has led to a member's dis- "charge or death during war "service was not noted in a "medical report made on that "member on the commencement "of his war service, a certificate "under para. 1 of this article "shall be given unless the evidence "shows that the conditions set "out in that paragraph are not "fulfilled."

Under art. 2 of the Royal Warrant, dealing with interpretation, it is provided that the certificate to be given by the Minister, where it involves a medical question, shall be in accordance with a certificate on that question of a medical officer or board of medical officers appointed or recognized by the Minister for the purpose.

(2) 1945 S. C. 21

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advise the tribunal on the question whether the reasons for disallowing the appellant's claim to a pension set out in the decision of the Ministry are acceptable in the light of his medical knowledge and experience.

The tribunal found that the report of the officer commanding the appellant's unit dated March 21, 1944, was an accurate statement of the appellant's service duties and conditions, but that these conditions were insufficient to cause the appellant's disability and that this was due to constitutional causes and origin. The tribunal was advised by its medical member that the reasons set out in the decision of the Ministry in the "statement of the case" were, in his opinion, correct and that in his experience the disorder is no more prevalent amongst service personnel than amongst civilians and that there were no conditions in the service of the appellant that would render probable the contention that his service conditions caused or aggravated the appellant's disability. They came to the conclusion that the decision of the Ministry was correct and that the matters relied on by the appellant did not and, in view of the nature of the disease, could not cause or aggravate the disease. Accordingly, they dismissed the appeal.

The question submitted for the opinion of the High Court was whether there was evidence within the meaning of art. 4 (3.) of the Royal Warrant upon which the tribunal could disallow the appeal.

Mitchison for appellant. Under r. 15 of the Pensions Appeal Tribunals (England and Wales) Rules, 1943, a tribunal may take the opinion of a medical specialist or other technical expert and, where the question is a medical question, may arrange for the appellant to be examined by a medical specialist. Either the appellant or the Minister may comment in writing on the opinion or report of the specialist or expert. In *Irving* v. *The Minister of Pensions* (1) the Lord Justice Clerk held that the subject of such comments must be taken into consideration by the tribunal. But the tribunal are not entitled to consider the Minister's reasons for making the decision against which the appeal is brought contained in "the statement of the case" sent by the Minister to both sides under r. 5, being, in effect, the judgment appealed from, as affording any evidence of the correctness of any relevant facts or matters of expert opinion contained therein. These "reasons" of the Minister, as they

(1) 1945 S. C. 21.

appear in "the statement of the case," are unsigned and it is not apparent to the appellant whether they have been made by a medical man, or, if made by a medical man, what was his status in the medical profession. Secondly, the tribunal was advised by its medical member that the Minister's reasons, so set out, were correct, and he gave testimony from his own experience of the etiology of schizophrenia. These observations and that advice were not evidence which the tribunal could receive. The appellant has no means of knowing what the medical member's testimony or advice will be, and no opportunity to combat it. Schizophrenia was not noted in a medical report made on the appellant at the commencement of his war service. By art. 4 (3.) of the Royal Warrant, therefore, the appellant was entitled to a certificate that this disability, which led to his discharge, was attributable to or aggravated by war service, unless the evidence showed that these conditions were not fulfilled. The onus of proving that they were not fulfilled lay on the Minister and he failed to discharge it.

H. L. Parker for the Minister. The "statement of the case" is sent to the appellant who may by r. 5 (2.) submit an "answer" thereto indicating (1.) the facts in the statement of the case which he disputes; (2.) any further facts which are, in his opinion, relevant, and (3.) his reasons for thinking that the decision of the Minister was wrong. The Minister may comment in writing on the appellant's answer (r. 5 (5.)). The tribunal who, it is plain, are not bound by the rules of evidence must consider the reasons put forward by the Minister and those, if any, given by the appellant in answer thereto, and the Minister's comments, if any, in reply. Presumably, all these comments are provided for by the rules for the consideration of the tribunal. The tribunal have through their medical member knowledge of the etiology of disease and of this disease —schizophrenia—and this knowledge they are entitled to use in arriving at their decision. They are entitled to the advice of their medical member on all relevant medical questions, and also as to the correctness of the Minister's reasons for disallowing the appeal, since the medical member is a member of the tribunal. The tribunal had evidence before them that the appellant was suffering from schizophrenia, and also evidence of the strain to which he had been subjected by his service on the East coast of England. On this evidence only they were

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entitled to arrive at their findings and to dismiss the appeal. [*Mitchell* v. *Minister of Pensions* (1) was referred to.]

Mitchison replied.

Cur. adv. vult.

May 17. TUCKER J. delivered the following written judgment. There can be no doubt that under the Pensions Appeal Tribunals Rules (England and Wales), 1943—particularly r. 12 (2)—the tribunal was entitled to receive "the statement of the case," in so far as it consisted of a statement of the relevant facts, as prima facie evidence of the facts so stated. Moreover, it could receive documentary evidence submitted by either party. In this case, however, the question arises whether the tribunal was entitled to receive that part of "the statement of the case" which consisted of the Minister's reasons for his decision as evidence of any facts or matters of expert medical opinion contained therein and relevant to the issues before them. The tribunal must, of course, give due weight to these reasons and will no doubt be guided by their medical member on technical medical matters arising therefrom, but that is, of course, a very different matter to treating the reasons as equivalent to a written and signed report by a medical expert. It is clear that the tribunal's finding is based either on their acceptance of the Minister's reasons for his decision as "evidence," coupled with their medical member's advice thereon, or on the advice of their medical member given on the undisputed facts as set out in the first part of the Minister's "statement of the case," dealing only with facts. Unless one or other of those bases for their decision can be justified it is, in my view, clear that the remaining material in the case would be insufficient to discharge the onus which lies on the Minister. Section 6, sub-s. 4, of the Pensions Appeal Tribunals Act, 1943, provides: "In determining an appeal under this Act in respect of any "claim or award, the tribunal shall be bound by the terms of "the Royal Warrant, Order in Council, Order of His Majesty "or scheme under which the claim or award purports to be "made, and of any enactment under which any scheme is "made, being terms relating to the issues before the tribunal." Article 4 (2.) and (3.) of the Royal Warrant as to the onus of proof is of the greatest importance to all applicants for pensions and must—one would suppose—be decisive in a large number of cases where the ascertainment of relevant facts is difficult or impossible. In this connexion I should like to refer to two passages in the judgments of the Lord Justice Clerk in the cases of *Irving* v. *The Minister of Pensions* (1) and *Mitchell* v. *The Minister of Pensions* (2).

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(1) 1945 S. C. 131.

(2) See note on pp. 492, 493.

In the former case he used this language: " It is of the " utmost importance to keep in view that under the new Royal " Warrant which regulates the right to pensions, it is expressly " provided, in contradistinction to the rule which formerly " prevailed, that ' in no case shall there be an onus on any " ' claimant . . . . to prove the fulfilment of the conditions " ' . . . . and the benefit of any reasonable doubt shall be " ' given to the claimant.' In every case of disputed facts " between two parties, the onus of proof must inevitably be " either on the one or on the other, and the result of the " provision I have quoted is that the onus of proof is on the " Minister. This means that, if in the end of the day the " considerations for and against the grant of a pension are so " evenly balanced that the tribunal is in reasonable doubt " whether to allow or to refuse the appeal, the claimant must " succeed. The tribunal in dealing with an appeal are thus in " much the same position as a jury in a criminal trial, who, if " left in reasonable doubt as to the guilt of the accused, are " bound to acquit him. The doubt must, of course, be a " reasonable doubt, and not a strained or fanciful acceptance of " remote possibilities. Further, the mere fact that the case is " one of complexity or great difficulty is perfectly compatible " with a decision being reached without reasonable doubt. " But in every pensions appeal, the question is not: Has the " claimant satisfied us that he is right? but has the Minister " satisfied us that the claimant is wrong? "

In *Mitchell* v. *The Minister of Pensions* (2) he said: " On the " first question I propose to say very little. In the recent case " of *Irving* v. *The Minister of Pensions* (1), which we decided " in November, 1944, I expressed views, in which my brethren " concurred, with regard to the nature and effect of the onus " of proof which arises under the Royal Warrant. To that " statement I have nothing to add, and there I propose to leave " the matter, because in his concluding speech the learned " Solicitor-General made it abundantly plain that he had no " quarrel with that formulation of the position. I shall

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(1) 1945 S. C. 21, 29.

(2) 1945 S. C. 135.

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"accordingly proceed to the second issue raised in this case "upon the footing that, under art. 4, sub-s. (2.), of the Royal "Warrant, not only is there no onus of proof on the claimant "to a pension, but the benefit of any reasonable doubt must be "given to the claimant, and therefore the detriment arising "from any reasonable doubt must be incurred by the Minister. "I further have in view the specialty, which was not present in "the case of *Irving* v. *The Minister of Pensions* (1), that, by "art. 4, para. (3.) of the Royal Warrant, it is provided that "'Where an injury or disease'—I read short—'which has "'led to a member's death was not noted in a medical report "'made on that member on the commencement of his war "'service, a certificate *shall* be given, unless the evidence shows "'that the conditions . . . . are not fulfilled.' In that "provision I find an added emphasis upon the outlook of the "preceding provisions dealing with the duties in the matter of "proof imposed upon the claimant and the Minister "respectively."

I respectfully concur in these observations and desire to adopt them as representing my views. The tribunal, in accepting the Minister's decision as evidence, founded themselves on the decision of the Court of Session in *Irving* v. *The Minister of Pensions* (1). That was a decision given under r. 15, which gives power to the tribunal to take the opinion of a medical specialist or other technical expert. After providing for copies of the specialist's report to be sent to the appellant and the Minister, r. 15 (3.) reads "together with a statement that the "appellant or the Minister may comment thereon in writing, "if he so desires, or may address the tribunal thereon at a "further hearing of the case." In *Irving* v. *The Minister of Pensions* (1) the Minister had submitted a lengthy report in writing with numerous quotations from medical text-books, and it was argued that these "comments" were inadmissible under r. 15. The court held that the document was admissible and that it was the duty of the tribunal to consider it. It is to be observed in that case that in the Minister's answer to the note for the appellant his contention was stated thus (2): "The "Minister having exercised his right to comment, it became "the duty of the tribunal to take these comments into con"sideration, not as 'medical evidence in the case,' but as "comments within the meaning of r. 15 (3.) and that is what "they did." I do not read the judgment in *Irving* v. *The Minister of Pensions* (1) on this point as intending to do more

(1) [1945] S. C. 21.

(2) Ibid. 25.

than accept the Minister's contention as set out above. However that may be, in my view the position under r. 15 is not comparable to that under r. 5, where the Minister is required to set out the reasons for his decision, that decision being the subject of the appeal. In my opinion it is impossible, even when dealing with tribunals which are not bound by the strict rules of evidence, to hold that statements whether of fact or expert opinion contained only in the judgment under appeal, and without any other support, oral or documentary, can be regarded as any evidence of the correctness of such facts or opinions, much less as sufficient to shift the onus of proof which lies on the Minister.

It remains to consider whether, apart from the Minister's decision, the tribunal could have come to the same conclusion on the advice of its medical member given on the undisputed facts, such advice relating to a matter of medical science, namely, the characteristics of a particular disease. It is no doubt true that the medical member is appointed for the express purpose of advising the other members of the tribunal on technical matters arising out of the evidence as to the proper medical inferences to be drawn from the facts established, but it is, I think, of the essence of "evidence," according to English ideas, when used with reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are made in the presence of or communicated to both parties before the tribunal reaches its decision. This is not in my view confined to judicial tribunals bound by legal rules of evidence, but is equally applicable to a quasi-judicial tribunal such as a pensions appeal tribunal, which is expressly required to have regard to the onus of proof in its adjudications. Information communicated by the medical member to his colleagues during their deliberations does not fulfil these requirements and cannot, in my opinion, be relied upon as evidence, so as to turn the scale and thus enable the Minister to discharge the onus of proof imposed upon him by the Royal Warrant. I would venture to suggest for the consideration of the responsible authorities that, where it is intended to lay before the tribunal expert medical evidence in documentary form, it is desirable that such evidence should show the name and qualifications of its author.

In the result I am of opinion that neither the Minister's decision nor the medical member's advice can be regarded as evidence, and that the remaining evidence was insufficient in

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law to discharge the onus imposed on the Minister. On the evidence adduced the appellant was entitled to an award. His appeal must be allowed and the question submitted to me in the case stated answered in the negative.

Appeal allowed.

Solicitors for appellant: *Waterhouse & Co., for Few & Kester, Cambridge.*

Solicitor for Minister: *The Treasury Solicitor.*

C. G. M.

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May 15, 17, 31.

Humphreys and Oliver JJ.

REX *v.* SUNDERLAND JUSTICES.

Ex parte HODGKINSON.

Bastardy—Affiliation order refused—Fresh evidence—Order granted on second application—Res judicata.

Justices have jurisdiction to hear an application by a woman for an affiliation order after a refusal of a previous application on the merits, and to make the order if fresh evidence is adduced by the applicant.

Motion for order of certiorari.

On November 11, 1944, Margaret Brown gave birth to a bastard child of which she alleged that the applicant, Leslie Hodgkinson, was the father. On February 17, 1945, she applied to the respondents, the Sunderland justices, for an order in bastardy against the applicant. After hearing evidence on both sides the justices dismissed the complaint on the merits. On March 6, 1945, Margaret Brown issued a second complaint on fresh evidence. Objection was taken that the justices had no jurisdiction to hear the application as the matter was res judicata. The justices overruled the objection, and on March 17, 1945, made an order against the applicant, who then applied for an order of certiorari.

W. A. L. Raeburn for the applicant. The justices were wrong. There is no decision directly in point. In *Reg.* v. *Gaunt* (1) the court said that where a first application had been heard on the merits, although that was no absolute bar to a second application, the justices were bound to attach so much weight

(1) (1867) L. R. 2 Q. B. 466.

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to the result of the first application as to make it practically conclusive. In that particular case, however, it was held that the justices had jurisdiction to hear the second application, as the most important witness for the defence on the first application had been convicted of perjury in giving that evidence, and therefore the hearing had been unfair. The woman cannot as a matter of right demand a second hearing unless the first resulted in something in the nature of a non-suit—*Reg.* v. *Machen* (1). The reason was that at that time the woman had no right to appeal against a refusal of her application, and the position of the parties at the hearing was therefore said to be unequal. But that does not apply where, as here, there has been a hearing and a decision on the merits. By the Criminal Justice Administration Act, 1914, s. 17, sub-s. 4, a right of appeal was first given to the woman, and this would seem to take away the basis of the decision in *Reg.* v. *Machen* (1). It is true that in *McGregor* v. *Telford* (2) this was held not to be the case, but in *Kenney* v. *Kenney* (3) it was said that *McGregor* v. *Telford* (2) might have to be reconsidered. Dicta of Cockburn C.J. in *Reg.* v. *Harrington* (4) support the applicant's contention.

[HUMPHREYS J. The justices have no power to say that the defendant is not the father; they can only make an order in the nature of a non-suit.]

P. H. M. Oppenheimer (for *Bibby-Trevor* on war service) for the respondents. The case of *Reg.* v. *Hall and Gillespie* (5) is on all fours with the present case. It was a decision of Day J. and Wills J. and should be followed. In that case there had been two previous unsuccessful applications, but on this application fresh evidence was adduced. The dicta in *Reg.* v. *Harrington* (4) were on the basis that no fresh evidence was called on the second application, but in the present case fresh evidence was called. In *McGregor* v. *Telford* (2) it was held that the remedy by appeal was an additional remedy, and did not take away the woman's right to make a second application, which was thus recognized by the court.

Cur. adv. vult.

May 31, 1945. HUMPHREYS J. read the following judgment. This was a motion for an order of certiorari addressed to the

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(1) (1849) 14 Q. B. 74.

(2) [1915] 3 K. B. 237.

(3) (1925) 41 T. L. R. 571.

(4) (1864) 9 L. T. 721; 28 J. P. 485.

(5) (1887) 57 L. T. 306.

Sunderland justices to remove, for the purpose of its being quashed, an order made by them on March 17, 1945, adjudging that Leslie Hodgkinson, the applicant, is the putative father of a bastard child born to Margaret Brown on November 11, 1944, and ordering the said Leslie Hodgkinson to pay the sum of 7*s.* 6*d.* a week for the maintenance of the said child until it should attain the age of sixteen, and to pay further sums of money. The grounds on which relief is sought are two, the first being stated as follows: When the matter came before the said justices for determination on March 17, it was res judicata, having already been heard and determined on the merits on February 17, 1945.

Mr. Raeburn, in support of the motion, was not able to refer us to any case in which the court had quashed an order in bastardy on the ground that there had been a previous dismissal on the merits, even after a full hearing, but he relied on certain dicta to be found in the reports and on the doctrine of res judicata as applied to ordinary civil and criminal proceedings, and argued that the matter is open for judicial decision by this court since there is no direct and clear authority to the contrary. I do not think that the considerations applicable in the case of criminal proceedings, or in civil actions, are of any assistance in this matter. Bastardy proceedings are the creation of statute and may be said to have their origin in the powers conferred upon guardians of the poor, to whom was chargeable the maintenance of an illegitimate child, to recover from the putative father the whole or part of the costs of maintenance. The main object of ordering payments by the putative father is still to provide for the support of the child. The relevant statute is the Bastardy Laws Amendment Act, 1872, which, after providing in s. 3 for the issue and service of a summons on the man alleged by the complainant to be the father of the child, enacts in s. 4 that the justices shall hear the evidence of the complainant and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices they may adjudge the man to be the putative father and may order certain payments to be made by him. The statute is silent as to any order to be made by the justices if they are not satisfied that the necessary proof has been given.

The earliest case cited in argument was *Reg.* v. *Machen* (1),

(1) 14 Q. B. 74.

in which the judgment of the court (consisting of Lord Denman C.J., Patteson J., Wightman J. and Erle J.) was delivered by the Chief Justice. In that case a mandamus was asked for, requiring justices to hear and determine an application made to them on February 27 on behalf of Hannah Jones, a single woman, for an order in bastardy upon White, the putative father of her bastard child. The justices refused to hear the case on the ground that they had on the previous January 30 heard and determined the same matter, they having on that occasion dismissed the case on the ground that they considered the evidence of the complainant not sufficiently corroborated. It was, however, sworn by one of the justices and by the clerk to the justices that the first application had been dismissed on the merits and that this had been proved before the justices on February 27. The rule was made absolute. That decision has stood for ninety-six years. It has never been over-ruled; on the contrary, it has been repeatedly followed and declared to be a binding authority. It is true that the ratio decidendi has been the subject of a somewhat remarkable divergence of judicial opinion. It would seem that some judges have regarded a dismissal for lack of sufficient corroboration as not amounting to a dismissal on the merits. However this may be, I am content to abide by the language of the Chief Justice as reported. Lord Denman professed to found himself on the old case of *Rex* v. *Jenkin* (1), a case decided by Lord Hardwicke. In that case the court quashed an order by justices declaring that the alleged putative father was not the reputed father of the bastard and acquitting him of the same, on the ground that the order was ultra vires since the justices had no power to make a final order of discharge in a bastardy case. Lord Denman then refers to the limited powers conferred by the Act then in force, and continues as follows (2): " We cannot, therefore, see that the legislature intended them " to have any power to adjudicate finally against the mother. " Their dismissal of the application is rather in the nature of a " non-suit in an action; in which case the plaintiff may come " again better prepared. We are far from saying that the " dismissal is to have no weight: but we think that the " justices cannot refuse to hear the second application. If it " should appear to them that the matter was fully inquired into " on the first occasion, they will reasonably view any new " evidence with much suspicion, and sift it accordingly:

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(1) (1736) Ca. temp. Hardwicke, 301. (2) 14 Q. B. 80.

" but we do not think that the dismissal can operate as a bar to " further inquiry." No language could be clearer or more precise. Erle J., who was party to the decision in *Machen's* case (1), had the matter before him again in *Ex parte Westerman* (2). The headnote reads : " A second application may be " made for an order of affiliation, although the first was dis- " missed on the merits after a full examination." Erle J. considered the matter concluded by *Machen's* case (1) and so held.

In 1864 the case of *Reg.* v. *Harrington* (3) was decided. (The case of *Reg.* v. *Clark* (4) referred to in some text books as a different case appears to be merely a report of *Reg.* v. *Harrington* (3) under a different name.) In that case the first application by the mother was dismissed, " she not being prepared with " corroborative evidence." A second application and hearing followed and an order of affiliation was made. A rule being obtained on the ground that the dismissal of the first application was a bar to any subsequent application, the rule was discharged with costs by Cockburn C.J., Blackburn J. and Mellor J. Some of the dicta in that case seem at first sight to support Mr. Raeburn's argument, particularly the passage in the judgment of the Chief Justice reported in the Law Times Report as follows : " If there has been a hearing upon the " merits, and a dismissal upon the merits, and if that be brought " to the notice of the justices upon a second application, and " there is no other evidence produced, I think that ought to be a " sufficient answer, and if in this case it had been brought to the " attention of the justices that the case had before been dis- " missed upon the merits, and that there was no other evidence " in support of the application than was before submitted to " them, I should have been disposed to give effect to the present " application." It may be that the governing words in that passage are, " and that there was no other evidence in support " of the application than was before submitted." I myself would not hold that justices are bound to hear a second application founded solely upon evidence already heard by the court and held by them to be insufficient. The judgments of Blackburn J. and Mellor J. deal with the meaning of the expression " upon the merits." I find it difficult to accept as completely accurate the report of the judgment of Blackburn J. in that case, having regard to the clear expression by that learned judge in a later case of his view of the effect of the decision in *Rex* v. *Harrington* (1). It is sufficient to say that, in my judgment, the case cannot be regarded as any authority for the proposition that the dismissal of one application, even on the merits, deprives the justices of jurisdiction to hear a further complaint on fresh evidence. The report in the Justice of the Peace (1) differs somewhat as to the language used in the judgments. For instance, the Chief Justice is reported to have said that if the matter had been already fully heard and determined the principle of res judicata would apply; but I think it is tolerably clear that his Lordship was using that expression, if he used it at all, as referring to the attitude to be adopted by the justices in a case where they were invited to overrule their previous decision on the same evidence. It is to be observed also that, according to the report in the Justice of the Peace, upon an application for costs being made, the Chief Justice said (2): " I think we must consider this as an " attempt to overrule *Reg.* v. *Machen* (3) and must discharge " the rule with costs."

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(1) 14 Q. B. 74.
(2) (1851) 16 L. T. Jour. 420.
(3) 9 L. T. 721 ; 28 J. P. 485.
(4) 28 J. P. 102.

The case of *Reg.* v. *Gaunt* (4), seems to me to be precisely in point on the present motion. The first application by the mother was dismissed, partly owing to the evidence of one of the witnesses for the defendant. That witness was afterwards convicted of perjury in giving that evidence. A second complaint by the mother was heard, in spite of objection, and an order was made. Blackburn J. in the course of his judgment (5) refers to *Harrington's* case (1) as having decided that the previous inquiry was no absolute bar, although the matter had been fully heard, but that the justices on a second inquiry ought to attach so much weight to the previous decision as to make it, in an ordinary case, practically conclusive. He then refers to the conviction for perjury and continues: " The only question on the present application is, " whether [the justices] had jurisdiction, and they clearly had, " and the rule must therefore be discharged." Mellor J. and Lush J. concurred. Here, again, at a later point in his judgment, Blackburn J. is reported as speaking of the justices treating the matter as res judicata; but it is to be observed that the report of the same case in the Law Journal (4) omits those words and

(1) 9 L. T. 721; 28 J. P. 485.
(2) 28 J. P. 486.
(3) 14 Q. B. 74.
(4) L. R. 2 Q. B. 466; 36 L. J. (M. C.) 88, sub. nom. *Reg.* v. *Grant.*
(5) L. R. 2 Q. B. 469, 470.

substitutes this: "No doubt the justices would regard a "previous dismissal of a summons upon the merits as very "cogent evidence in favour of the defendant." I think myself that it is dangerous to rely upon the ipsissima verba of any judgment not revised by the learned judge himself.

Finally came the case of *Reg.* v. *Hall and Gillespie* (1) where the first application of the mother was dismissed on the ground of the insufficiency of the evidence. Fresh evidence having been obtained by the mother, the matter was again heard before the justices, when it was dismissed upon the merits. A few days later the mother again applied for a further hearing on the ground that she had fresh evidence. The justice, being of opinion that the matter was res judicata and that he had no jurisdiction, refused to issue a third summons. The mother obtained a rule nisi for a mandamus to the magistrates, upon the hearing of which no one appeared to show cause. *Gaunt's* case (2) was cited in support of the rule and the court made the rule absolute, giving no further judgment on the matter.

In that state of the law the Criminal Justice Administration Act, 1914, was passed, which by s. 37, sub-s. 2, gave, for the first time, a right of appeal to the mother from a refusal by a court of summary jurisdiction to make the order asked for. The effect of that alteration in the law was considered in *McGregor* v. *Telford* (3). It was argued that the new right of appeal given to the mother removed the substratum of the judgment in *Reg.* v. *Machen* (4). The court, however, held that the Act does not impliedly take away from the mother of a bastard child any previously existing right which she may have to make a second application to a court of summary jurisdiction. That case is clearly binding on this court. I express no opinion as to the correctness of the obiter dictum of Lord Reading C.J. (5) on the oft-disputed ratio decidendi of the decision in *Reg.* v. *Machen* (4).

On a consideration of the authorities, I am of opinion that the justices in this case had jurisdiction to hear the second complaint of Margaret Brown and, on fresh evidence being produced, to make the order in question. Unfortunately that conclusion does not dispose of the motion. Mr. Raeburn has a

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(1) 57 L. T. 306.

(2) L. R. 2 Q. B. 466; 36 L. J. (M. C.) 88, sub nom. *Reg.* v. *Grant.*

(3) [1915] 3 K. B. 237.

(4) 14 Q. B. 74.

(5) [1915] 3 K. B. at p. 240.

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second ground, as follows; that the order was not made judicially, the said justices having stopped the case and determined the issue in favour of the complainant before the case for the defence had been fully presented to them. [His Lordship discussed the evidence on this point, and continued :] It is plain that the justices, after being made aware that the defendant had in attendance, and wished to call, other witnesses, declined to hear those witnesses and decided against him. In the circumstances, in my opinion, the order made by the justices cannot stand and the order of certiorari must go, but I think it must be accompanied by an order of mandamus to hear and determine the complaint according to law.

OLIVER J. I have had an opportunity of reading the judgment that my Lord has just pronounced, and I desire to say that I entirely agree with it and would seek to add only these few words. Technically, there is nothing to prevent the re-hearing of applications in bastardy cases. That right, however, should obviously only be exercised in cases where there is fresh evidence of a serious kind. It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision of its own.

Solicitors for applicant : *Isadore Goldman & Son, for R. R. Crute & Son, Sunderland.*

Solicitors for respondents : *Taylor, Willcocks & Co., for Nesbitt, Cook & Carter, Sunderland.*

W. L. L. B.

HANNAH v. PEEL.

1945
June 11, 13.

Birkett J.

Trover—Detinue—Possession—Chattel found on land never occupied by freeholder—Owner of chattel unknown—Right of finder.

The defendant was the owner of a house which he had never himself occupied. While the house was requisitioned, the plaintiff, a soldier, found in a bedroom used as a sick-bay, loose in a crevice on the top of a window frame, a brooch, the owner of which was unknown. There was no evidence that the defendant had any knowledge of the existence of the brooch before it was found by the plaintiff; but the police to whom the plaintiff handed the brooch to ascertain its owner, delivered it to the defendant who claimed it as being on premises of which he was the owner.

Held, that the plaintiff, as finder, was entitled to the possession of the brooch as against all others than its owner.

Bridges v. *Hawkesworth* (1851) 21 L. J. (Q. B.) 75; 15 Jur. 1079, followed.

South Staffordshire Water Co. v. *Sharman* [1896] 2 Q. B. 44 and *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562, distinguished.

ACTION tried by Birkett J.

On December 13, 1938, the freehold of Gwernhaylod House, Overton-on-Dee, Shropshire, was conveyed to the defendant, Major Hugh Edward Ethelston Peel, who from that time to the end of 1940 never himself occupied the house and it remained unoccupied until October 5, 1939, when it was requisitioned, but after some months was released from requisition. Thereafter it remained unoccupied until July 18, 1940, when it was again requisitioned, the defendant being compensated by a payment at the rate of 250*l.* a year. In August, 1940, the plaintiff, Duncan Hannah, a lance-corporal, serving in a battery of the Royal Artillery, was stationed at the house and on the 21st of that month, when in a bedroom, used as a sick-bay, he was adjusting the black-out curtains when his hand touched something on the top of a window-frame, loose in a crevice, which he thought was a piece of dirt or plaster. The plaintiff grasped it and dropped it on the outside window ledge. On the following morning he saw that it was a brooch covered with cobwebs and dirt. Later, he took it with him when he went home on leave and his wife having told him it might be of value, at the end of October, 1940, he informed his commanding officer of his find and, on his advice, handed it over to the police, receiving a receipt for it. In August, 1942, the owner not having been found the police handed the brooch to the defendant, who sold it in October, 1942, for 66*l.*, to Messrs. Spink & Son, Ltd., of London, who resold it in the following month for 88*l.* There was no evidence that the defendant had any knowledge of the existence of the brooch before it was found by the plaintiff. The defendant had offered the plaintiff a reward for the brooch, but the plaintiff refused to accept this and maintained throughout his right to the possession of the brooch as against all persons other than the owner, who was unknown. By a letter, dated October 5, 1942, the plaintiff's solicitors demanded the return of the brooch

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from the defendant, but it was not returned and on October 21, 1943, the plaintiff issued his writ claiming the return of the brooch, or its value, and damages for its detention. By his defence, the defendant claimed the brooch on the ground that he was the owner of Gwernhaylod House and in possession thereof.

Scott Cairns for plaintiff. The plaintiff, as the finder of this brooch, is entitled to its possession as against all persons other than the owner, who is unknown: *Armory* v. *Delamirie* (1). The case of *Bridges* v. *Hawkesworth* (2) is precisely in point, for in that case the finder of a parcel of bank-notes found it on the floor of a shop. The defendant here had no knowledge of the existence of the brooch, as the shopkeeper in *Bridges* v. *Hawkesworth* (2) had no knowledge of the existence of the parcel of banknotes. As Professor A. L. Goodhart pointed out in his "Three Cases on Possession," in "Essays in Jurisprudence "and the Common Law" (1931), at pp. 76-90, Mr. Justice O. W. Holmes, Sir Frederick Pollock and Sir John Salmond all consider the decision in *Bridges* v. *Hawkesworth* (2) to be correct; Mr. Justice Holmes on the ground that "the "shopkeeper, not knowing of the thing, could not have the "intent to appropriate it, and, having invited the public to his "shop he could not have the intent to exclude them "from it" (3); Sir Frederick Pollock on the lack of de facto control by the shopkeeper (4); and Sir John Salmond on the absence of the animus possidendi (5). Lord Russell of Killowen C.J., in *South Staffordshire Water Co.* v. *Sharman* (6) said that the ground of the decision in *Bridges* v. *Hawkesworth* (2) as was pointed out by Patteson J. was that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his "house." But that was not so, since Patteson J. said in the earlier case that the county court judge, whose decision was appealed, was mistaken in holding that the place in which the parcel of notes was found made any difference (7). In *South Staffordshire Water Co.* v. *Sharman* (6) the defendant while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings in the mud at the bottom of the pool. It was held that the plaintiffs were entitled to the possession of the rings. It is a sufficient explanation of that case that Sharman, as the servant or agent of the water company, though he was the first to obtain the custody of the rings, obtained possession of them for his employers, the water company, and could claim no title to them for himself. It may be that a man owns everything which is attached to or under his land: see *Elwes* v. *Brigg Gas Co.* (1). But a man does not of necessity own or possess a chattel which is lying unattached on the surface of his land. The defendant did not know of the existence of this brooch and had never exercised any kind of control over it. The plaintiff, therefore, as its finder, is entitled to its possession.

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(1) (1722) 1 Str. 505.

(2) (1851) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(3) The Common Law (1881) at p. 222.

(4) Pollock and Wright on Possession in the Common Law, at p. 37 and seq.

(5) Jurisprudence (9th ed.) 381-2.

(6) [1896] 2 Q. B. 44, 47.

(7) 21 L. J. (Q. B.) 78.

Binney for defendant. The defendant was entitled to the possession of the brooch because, when it was found, it was on his land. Lord Russell of Killowen C.J. said in *South Staffordshire Water Co.* v. *Sharman* (2): "The general principle seems "to me to be that where a person has possession of house or "land, with a manifest intention to exercise control over it and "the things which may be upon it or in it, then, if something is "found on that land, whether by an employee of the owner or "by a stranger, the presumption is that the possession of that "thing is in the owner of the locus in quo." If that statement of law is correct, the defendant here should succeed. The owner of this land does not lose his right to the chattels found on or in it by letting the land: *Elwes* v. *Brigg Gas Co.* (1). The brooch here was found in a crevice of masonry and the facts are similar to those in *South Staffordshire Water Co.* v. *Sharman* (2). In neither case did the owner of the land know of the existence of the thing found. *Bridges* v. *Hawkesworth* (3) can be distinguished on the ground that the parcel of notes was found in a part of the shop to which the public had access—in effect they were found in a public place. If *Bridges* v. *Hawkesworth* (3) is not distinguishable, it has been overruled by *South Staffordshire Water Co.* v. *Sharman* (2) and *Elwes* v. *Briggs Gas Co.* (1).

Cur. adv. vult.

June 13. BIRKETT J. There is no issue of fact in this case

(1) (1886) 33 Ch. D. 562.

(2) [1896] 2 Q. B. 44, 47.

(3) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

between the parties. As to the issue in law, the rival claims of the parties can be stated in this way: The plaintiff says: "I claim the brooch as its finder and I have a good title against "all the world, save only the true owner." The defendant says: "My claim is superior to yours inasmuch as I am the "freeholder. The brooch was found on my property, "although I was never in occupation, and my title, therefore, "ousts yours and in the absence of the true owner I am "entitled to the brooch or its value." Unhappily the law on this issue is in a very uncertain state and there is need of an authoritative decision of a higher court. Obviously if it could be said with certainty that this is the law, that the finder of a lost article, wherever found, has a good title against all the world save the true owner, then, of course, all my difficulties would be resolved; or again, if it could be said with equal certainty that this is the law, that the possessor of land is entitled as against the finder to all chattels found on the land, again my difficulties would be resolved. But, unfortunately, the authorities give some support to each of these conflicting propositions.

In the famous case of *Armory* v. *Delamirie* (1), the plaintiff, who was a chimney sweeper's boy, found a jewel and carried it to the defendant's shop, who was a goldsmith, in order to know what it was, and he delivered it into the hands of the apprentice in the goldsmith's shop, who made a pretence of weighing it and took out the stones and called to the master to let him know that it came to three-halfpence. The master offered the boy the money who refused to take it and insisted on having the jewel again. Whereupon the apprentice handed him back the socket of the jewel without the stones, and an action was brought in trover against the master, and it was ruled "that "the finder of a jewel, though he does not by such finding "acquire an absolute property or ownership, yet he has such "a property as will enable him to keep it against all but the "rightful owner, and consequently may maintain trover." The case of *Bridges* v. *Hawkesworth* (2) is in process of becoming almost equally as famous because of the disputation which has raged around it. The headnote in the Jurist is as follows: "The place in which a lost article is found does not constitute "any exception to the general rule of law, that the finder is "entitled to it as against all persons except the owner."

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(1) 1 Str. 505.

(2) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

The case was in fact an appeal against a decision of the county court judge at Westminster. The facts appear to have been that in the year 1847 the plaintiff, who was a commercial traveller, called on a firm named Byfield & Hawkesworth on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying on the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of 65*l*. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. Then various advertisements were put in the papers asking for the owner, but the true owner was never found. No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant refused to deliver them up to the plaintiff, and an action was brought in the county court of Westminster in consequence of that refusal. The county court judge decided that the defendant, the shopkeeper, was entitled to the custody of the notes as against the plaintiff, and gave judgment for the defendant. Thereupon the appeal was brought which came before the court composed of Patteson J. and Wightman J. Patteson J. said: "The notes which are "the subject of this action were incidentally dropped, by mere "accident, in the shop of the defendant, by the owner of them. "The facts do not warrant the supposition that they had been "deposited there intentionally, nor has the case been put at "all upon that ground. The plaintiff found them on the floor, "they being manifestly lost by someone. The general right of "the finder to any article which has been lost, as against all the "world, except the true owner, was established in the case of "*Armory* v. *Delamirie* (1) which has never been disputed. "This right would clearly have accrued to the plaintiff had the "notes been picked up by him outside the shop of the defendant "and if he once had the right, the case finds that he did not "intend, by delivering the notes to the defendant, to waive "the title (if any) which he had to them, but they were handed "to the defendant merely for the purpose of delivering them "to the owner should he appear." Then a little later: "The

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(1) 1 Str. 505.

" case, therefore, resolves itself into the single point on which it " appears that the learned judge decided it, namely, whether " the circumstance of the notes being found inside the defen- " dant's shop gives him, the defendant, the right to have them " as against the plaintiff, who found them." After discussing the cases, and the argument, the learned judge said: " If the " discovery had never been communicated to the defendant, " could the real owner have had any cause of action against " him because they were found in his house? Certainly not. " The notes never were in the custody of the defendant, nor " within the protection of his house, before they were found, " as they would have been had they been intentionally " deposited there; and the defendant has come under no respon- " sibility, except from the communication made to him by the " plaintiff, the finder, and the steps taken by way of advertise- " ment. . . . We find, therefore, no circumstances in this case " to take it out of the general rule of law, that the finder of a lost " article is entitled to it as against all persons except the real " owner, and we think that that rule must prevail, and that the " learned judge was mistaken in holding that the place in which " they were found makes any legal difference. Our judgment, " therefore, is that the plaintiff is entitled to these notes as " against the defendant."

It is to be observed that in *Bridges* v. *Hawkesworth* (1) which has been the subject of immense disputation, neither counsel put forward any argument on the fact that the notes were found in a shop. Counsel for the appellant assumed throughout that the position was the same as if the parcel had been found in a private house, and the learned judge spoke of " the " protection of his " (the shopkeeper's) " house." The case for the appellant was that the shopkeeper never knew of the notes. Again, what is curious is that there was no suggestion that the place where the notes were found was in any way material; indeed, the judge in giving the judgment of the court expressly repudiates this and said in terms " The learned " judge was mistaken in holding that the place in which they " were found makes any legal difference." It is, therefore, a little remarkable that in *South Staffordshire Water Co.* v. *Sharman* (2), Lord Russell of Killowen C.J. said: " The case " of *Bridges* v. *Hawkesworth* (1) stands by itself, and on special " grounds; and on those grounds it seems to me that the

(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(2) [1896] 2 Q. B. 47.

"decision in that case was right. Someone had accidentally "dropped a bundle of banknotes in a public shop. The shop-"keeper did not know they had been dropped, and did not in "any sense exercise control over them. The shop was open "to the public, and they were invited to come there." That might be a matter of some doubt. Customers were invited there, but whether the public at large was, might be open to some question. Lord Russell continued: "A customer "picked up the notes and gave them to the shopkeeper in "order that he might advertise them. The owner of the notes "was not found, and the finder then sought to recover them "from the shopkeeper. It was held that he was entitled to "do so, the ground of the decision being, as was pointed "out by Patteson J., that the notes, being dropped in the "public part of the shop, were never in the custody of the "shopkeeper, or 'within the protection of his house'." Patteson J. never made any reference to the public part of the shop and, indeed, went out of his way to say that the learned county court judge was wrong in holding that the place where they were found made any legal difference.

Bridges v. *Hawkesworth* (1) has been the subject of considerable comment by text-book writers and, amongst others, by Mr. Justice Oliver Wendell Holmes, Sir Frederick Pollock and Sir John Salmond. All three agree that the case was rightly decided, but they differ as to the grounds on which it was decided and put forward grounds, none of which, so far as I can discover, were ever advanced by the judges who decided the case. Mr. Justice Oliver Wendell Holmes wrote (2): "Common law judges and civilians would agree that the finder "got possession first and so could keep it as against the shop-"keeper. For the shopkeeper, not knowing of the thing, could "not have the intent to appropriate it, and, having invited the "public to his shop, he could not have the intent to exclude "them from it." So he introduces the matter of two intents which are not referred to by the judges who heard the case. Sir Frederick Pollock, whilst he agreed with Mr. Justice Holmes that *Bridges* v. *Hawkesworth* (1) was properly decided wrote (3): "In such a case as *Bridges* v. "*Hawkesworth* (1), where a parcel of banknotes was dropped

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(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(2) The Common Law (1881) at p. 222.

(3) Possession in the Common Law (Pollock and Wright) at p. 39.

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"on the floor in the part of a shop frequented by "customers, it is impossible to say that the shopkeeper has any "possession in fact. He does not expect objects of that kind "to be on the floor of his shop, and some customer is more "likely than the shopkeeper or his servant to see and take them "up if they do come there." He emphasizes the lack of de facto control on the part of the shopkeeper. Sir John Salmond wrote (1): "In *Bridges* v. *Hawkesworth* (2) a parcel of bank-"notes was dropped on the floor of the defendant's shop, "where they were found by the plaintiff, a customer. It was "held that the plaintiff had a good title to them as against the "defendant. For the plaintiff, and not the defendant, was the "first to acquire possession of them. The defendant had not "the necessary animus, for he did not know of their existence." Professor Goodhart, in our own day, in his work "Essays "in Jurisprudence and the Common Law" (1931) has put forward a further view that perhaps *Bridges* v. *Hawkesworth* (2) was wrongly decided. It is clear from the decision in *Bridges* v. *Hawkesworth* (2) that an occupier of land does not in all cases possess an unattached thing on his land even though the true owner has lost possession.

With regard to *South Staffordshire Water Co.* v. *Sharman* (3), the first two lines of the headnote are: "The possessor of land is "generally entitled, as against the finder, to chattels found on "the land." I am not sure that this is accurate. The facts were that the defendant Sharman, while cleaning out, under the orders of the plaintiffs, the South Staffordshire Water Company, a pool of water on their land, found two rings embedded in the mud at the bottom of the pool. He declined to deliver them to the plaintiffs, but failed to discover the real owner. In an action brought by the company against Sharman in detinue it was held that the company were entitled to the rings. Lord Russell of Killowen C.J. said (4): "The plaintiffs "are the freeholders of the locus in quo, and as such they have "the right to forbid anybody coming on their land or in any "way interfering with it. They had the right to say that their "pool should be cleaned out in any way that they thought fit, "and to direct what should be done with anything found in the "pool in the course of such cleaning out. It is no doubt right, "as the counsel for the defendant contended, to say that the

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(1) Jurisprudence (9th ed.) 382.

(2) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(3) [1896] 2 Q. B. 44.

(4) Ibid. 46.

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"plaintiffs must show that they had actual control over the "locus in quo and the things in it; but under the circum- "stances, can it be said that the Minster Pool and whatever "might be in that pool were not under the control of the "plaintiffs? In my opinion they were. . . . The principle on "which this case must be decided, and the distinction which "must be drawn between this case and that of *Bridges* v. "*Hawkesworth* (1), is to be found in a passage in Pollock and "Wright's 'Essay on Possession in the Common Law,' p. 41: "'The possession of land carries with it in general, by our law, "'possession of everything which is attached to or under that "'land, and, in the absence of a better title elsewhere, the "'right to possess it also'." If that is right, it would clearly cover the case of the rings embedded in the mud of the pool, the words used being "attached to or under that land." Lord Russell continued: "'And it makes no difference that the "'possessor is not aware of the thing's existence . . . . It is "'free to anyone who requires a specific intention as part of a "'de facto possession to treat this as a positive rule of law. "'But it seems preferable to say that the legal possession rests "'on a real de facto possession constituted by the occupier's "'general power and intent to exclude unauthorized inter- "'ference.' That is the ground on which I prefer to base my "judgment. There is a broad distinction between this case and "those cited from Blackstone. Those were cases in which a "thing was cast into a public place or into the sea—into a place, "in fact, of which it could not be said that anyone had a real de "facto possession, or a general power and intent to exclude "unauthorized interference." Then Lord Russell cited the passage which I read earlier in this judgment and continued: "It is somewhat strange"—I venture to echo those words— "that there is no more direct authority on the question; but "the general principle seems to me to be that where a person "has possession of house or land, with a manifest intention to "exercise control over it and the things which may be upon "or in it, then, if something is found on that land, whether "by an employee of the owner or by a stranger, the presumption "is that the possession of that thing is in the owner of the locus "in quo." It is to be observed that Lord Russell there is extending the meaning of the passage he had cited from Pollock and Wright's essay on "Possession in the Common "Law," where the learned authors say that the possession of

(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

" land carries with it possession of everything which is attached to or under that land. Then Lord Russell adds possession of everything which may be on or in that land. *South Staffordshire Water Co.* v. *Sharman* (1) which was relied on by counsel for the defendant, has also been the subject of some discussion. It has been said that it establishes that if a man finds a thing as the servant or agent of another, he finds it not for himself, but for that other, and indeed that seems to afford a sufficient explanation of the case. The rings found at the bottom of the pool were not in the possession of the company, but it seems that though Sharman was the first to obtain possession of them, he obtained them for his employers and could claim no title for himself.

The only other case to which I need refer is *Elwes* v. *Brigg Gas Co.* (2), in which land had been demised to a gas company for ninety-nine years with a reservation to the lessor of all mines and minerals. A pre-historic boat embedded in the soil was discovered by the lessees when they were digging to make a gasholder. It was held that the boat, whether regarded as a mineral or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor though he was ignorant of its existence at the time of granting the lease. Chitty J. said (3) " The first question which does actually arise " in this case is whether the boat belonged to the plaintiff at " the time of the granting of the lease. I hold that it did, " whether it ought to be regarded as a mineral, or as part of the " soil within the maxim above cited, or as a chattel. If it was " a mineral or part of the soil in the sense above indicated, then " it clearly belonged to the owners of the inheritance as part " of the inheritance itself. But if it ought to be regarded as a " chattel, I hold the property in the chattel was vested in the " plaintiff, for the following reasons." Then he gave the reasons, and continued : " The plaintiff then being thus in " possession of the chattel, it follows that the property in the " chattel was vested in him. Obviously the right of the " original owner could not be established ; it had for centuries " been lost or barred, even supposing that the property had " not been abandoned when the boat was first left on the spot " where it was found. The plaintiff, then, had a lawful " possession, good against all the world, and therefore the

(1) [1896] 2 Q. B. 44.

(2) 33 Ch. D. 562.

(3) Ibid. 568.

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"property in the boat. In my opinion it makes no difference, "in these circumstances, that the plaintiff was not aware of "the existence of the boat."

A review of these judgments shows that the authorities are in an unsatisfactory state, and I observe that Sir John Salmond in his book on Jurisprudence (9th ed., at p. 383), after referring to the cases of *Elwes* v. *Brigg Gas Co.* (1) and *South Staffordshire Water Co.* v. *Sharman* (2), said: "Cases such as these, however, "are capable of explanation on other grounds, and do not "involve any necessary conflict either with the theory of "possession or with the cases already cited, such as *Bridges* "v. *Hawkesworth* (3). The general principle is that the first "finder of a thing has a good title to it against all but the true "owner, even though the thing is found on the property of "another person," and he cites *Armory* v. *Delamirie* (4) and *Bridges* v. *Hawkesworth* (3) in support of that proposition. Then he continues: "This principle, however, is subject to "important exceptions, in which, owing to the special circumstances of the case, the better right is in him on whose "property the thing is found," and he names three cases as the principal ones: "When he on whose property the thing is "found is already in possession not merely of the property, "but of the thing itself; as in certain circumstances, even "without specific knowledge, he undoubtedly may be." The second limitation Sir John Salmond puts is: "If anyone finds "a thing as the servant or agent of another he finds it not for "himself, but for his employer." Then: "A third case in "which a finder obtains no title is that in which he gets "possession only through a trespass or other act of wrongdoing." It is fairly clear from the authorities that a man possesses everything which is attached to or under his land. Secondly, it would appear to be the law from the authorities I have cited, and particularly from *Bridges* v. *Hawkesworth* (3), that a man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else. A difficulty however, arises, because the rule which governs things an occupier possesses as against those which he does not, has never been very clearly formulated in our law. He may possess everything on the land from which he intends to exclude others, if Mr. Justice Holmes is right; or he may possess those things of which he has a de facto control, if Sir Frederick Pollock is right.

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(1) 33 Ch. D. 562.

(2) [1896] 2 Q. B. 44.

(3) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

(4) 1 Str. 504.

There is no doubt that in this case the brooch was lost in the ordinary meaning of that term, and I should imagine it had been lost for a very considerable time. Indeed, from this correspondence it appears that at one time the predecessors in title of the defendant were considering making some claim. But the moment the plaintiff discovered that the brooch might be of some value, he took the advice of his commanding officer and handed it to the police. His conduct was commendable and meritorious. The defendant was never physically in possession of these premises at any time. It is clear that the brooch was never his, in the ordinary acceptation of the term, in that he had the prior possession. He had no knowledge of it, until it was brought to his notice by the finder. A discussion of the merits does not seem to help, but it is clear on the facts that the brooch was "lost" in the ordinary meaning of that word; that it was "found" by the plaintiff in the ordinary meaning of that word, that its true owner has never been found, that the defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff, who found the brooch. In those circumstances I propose to follow the decision in *Bridges* v. *Hawkesworth* (1), and to give judgment in this case for the plaintiff for 66*l*.

Judgment for plaintiff.

Solicitors for plaintiff: *Slaughter & May.*
Solicitors for defendant: *Rooper & Whately.*

(1) 21 L. J. (Q. B.) 75; 15 Jur. 1079.

C. G. M.

BRETT *v.* THROWER.

C. A.

1945

June 12.

Scott, MacKinnon and Morton L.JJ.

County court—Practice—Counter-claim—Nuisance—Title to hereditament not in question—Damages not exceeding 20l.—Ancillary injunction—Appeal without leave of judge—No right of appeal—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105 (*a*).

In an action or counter-claim for damages, not exceeding 20*l*., for nuisance, the addition of a claim by the aggrieved party for an ancillary injunction does not take the case out of the definite prohibition by s. 105 of the County Courts Act, 1934 (1), of an appeal without the leave of the county court judge.

PRELIMINARY OBJECTION on point of law.

The plaintiff, Frederick Charles Brett, was the owner and occupier of No. 53, Wroxham Road, Sproston, Norfolk. The defendant, Mrs. E. Thrower, was the owner and occupier of No. 51, the adjoining premises, the two gardens being separated by a wall said to belong to the defendant. In the county court at Norwich on March 13, 1945, the plaintiff claimed damages against the defendant for trespass alleged to have been committed on or about November 4, 1944, in cutting and mutilating a number of shrubs growing in the plaintiff's garden and against the defendant's wall. The defence was a denial of trespass, and, alternatively, that any trespass committed was for the purpose of abating a nuisance. The defendant counter-claimed for damages, estimated at 20*l.*, for damage to her wall, which she alleged the plaintiff unlawfully used to support a shed built on the plaintiff's land but resting on the defendant's wall and covering a ditch which was land belonging to the defendant. The defendant further asked for a declaration that the plaintiff was not entitled to keep the shed on the defendant's wall, or to keep the shrubs against it, and for an injunction ancillary to the claim and declaration. The county court judge held that the plaintiff had suffered no damages in respect of the trespass, and he dismissed the whole of the defendant's counter-claim, with costs. The defendant, without the leave of the county court judge, appealed against the dismissal of the counter-claim. The plaintiff raised this preliminary objection to the defendant's right of appeal.

Daynes K.C. and *Montgomery White* for the plaintiff. A question for the court is whether the word "claimed" in the proviso to s. 105 includes a counter-claim. No question arises affecting the title to an hereditament. It was alleged in the counter-claim that the plaintiff's shed was built over a ditch belonging to the defendant, but that claim has not been pursued and must be taken to have been abandoned. The notice of appeal given by the defendant states that the county court judge was wrong in law in not granting the injunction and declaration asked for by the defendant. The question here was not one of law, but one of fact relating to damage in respect of a nuisance. Damages are the gist of an action for nuisance. Nuisance is a tort and is specifically prohibited, by s. 105, from appeal without leave unless the damages claimed exceed 20*l*. In any event the right of appeal without leave depends on the plaintiff's claim and not on the amount counter-claimed. [*Smith* v. *Gill* (1) ; *Brune* v. *James* (2) ; and *Dixon* v. *Brown* (3) were referred to.] The county court has no jurisdiction to hear a substantive claim for an injunction, and the Court of Appeal cannot grant an injunction where the county court judge is unable to do so. The defendant has no right of appeal without the leave of the judge which was neither asked for nor given.

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(1) County Courts Act, 1934, s. 105: "If any party to any "proceedings in a county court is "dissatisfied with the determination or direction of the judge in "point of law or equity . . . . the "party aggrieved by the "judgment, direction, decision or "order of the judge may appeal "therefrom to the Court of Appeal ". . . . Provided that, without "the leave of the judge, there shall "be no appeal—(*a*) in any action "founded on contract or on tort "(other than an action for the "recovery of land or an action in "which the title to any hereditament has come in question) "where the debt or damage "claimed does not exceed twenty "pounds."

Linton Thorp K.C. and *Alpe* for the defendant. The objection is ill-founded. This is primarily an action for trespass and there is also a question of title to an hereditament involved in the appeal. The counter-claim is based on both trespass and nuisance. Although a county court judge has no jurisdiction to grant an injunction simpliciter, he can do so where it is asked for as ancillary to a claim for damages, even if they are less than 20*l*. There is here a right of appeal in respect of the counter-claim without the leave of the judge.

SCOTT L.J. having stated the facts, and read s. 105 of the County Courts Act, 1934, continued: The objection having been taken at the outset of the defendant's appeal that it is not competent to this court to deal with it because the leave of the county court judge has not been asked for and granted, we as yet know little of the facts of the case, but the gist of the matter is that for practical purposes there was no dispute at all as to the title or ownership of the wall, and the claim in respect of the ditch was abandoned by mutual consent as being irrele-

(1) [1896] 2 Q. B. 166.
(2) [1898] 1 Q. B. 417.
(3) [1915] 2 K. B. 294.

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vant. The real dispute was on the claim by the defendant that the plaintiff, by maintaining the shed in the neighbourhood of the wall and by growing various bushes in his garden near the wall and a fig tree against the wall, caused a nuisance to the defendant by making the wall damp and unsound. The learned judge dismissed the whole counter-claim with costs, and it is an appeal against that decision that was intended to be argued in this court. On those broad facts as to the issues before the county court, and the conduct of the case there, the only question that we have to decide is whether the objection is good. The defendant in her counter-claim not only claimed damages which she estimated at 20*l.*—a figure "not exceeding "20*l.*," but also claimed (1.) a declaration "that the plaintiff "is not entitled to keep the wooden shed on the defendant's "wall and covering the defendant's ditch"—that point was not a real issue in the proceedings before the learned judge—(2.) a declaration "that the plaintiff is not entitled to keep the "laurels, holly or other bushes and fig tree against the defen-"dant's wall," and (3.) an injunction ancillary to the declaration restraining the plaintiff from continuing to maintain and keep the said wooden shed and laurels, holly or other bushes and fig tree so as to be a nuisance to the defendant.

Quite shortly, the issue on which the defendant desired to appeal to us was in regard to the counter-claim for a nuisance, including the claim for damages, a declaration and an injunction. The county court has no jurisdiction over an independent injunction; it can only grant an injunction, as it can only grant a declaration, as ancillary relief to a cause of action within its jurisdiction. In this case it is quite clear that both the declaration and the injunction about the bushes were ancillary to the claim for damages for a nuisance by the continued maintenance of the bushes. No question of trespass or title came into the case at all. That being the nature of the litigation below, the case is one in which the damages in an action of tort as claimed by the defendant, equally with the damages claimed by the plaintiff, do not exceed 20*l.*, and, therefore, on the wording of s. 105 of the Act of 1934, prima facie the objection is well-founded. There have been certain decisions about the comparable section (s. 120) of the Act of 1888, and it is necessary to refer to them very shortly. The first case is that of *Smith* v. *Gill* (1), where it was decided by a Divisional Court that the phraseology of the proviso, where it speaks of an

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(1) [1896] 2 Q. B. 166.

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action founded on tort and the debt or damage claimed does not exceed 20*l*., might equally apply to a counter-claim as well as a claim; and there is nothing to be said about that decision except that I agree with it. In *Brune* v. *James* (1) the headnote is as follows: " In an action for trespass in the county court the " plaintiff claimed 40*s*. damages and an injunction. The " judge having given judgment for the plaintiff for damages " and an injunction:—Held, that the defendant might appeal " against so much of the judgment as granted the injunction " without first obtaining the leave of the judge, notwithstanding the provisions of s. 120 of the County Courts " Act, 1888." There the court treated the injunction as an independent right, rejecting the argument for the plaintiff that an injunction is a remedy and not a cause of action, and that, therefore, it is a part of the action for damages. The case is very shortly reported, but in my view that decision cannot be cited as an authority in a case where the claim is for an injunction by way of relief ancillary to a claim for damages for nuisance. It is unnecessary in the present appeal to discuss the question of an injunction to restrain a trespass, and I say no more about that case. In *Dixon* v. *Brown* (2), a similar question arose. That case also was an action for trespass in which the plaintiff claimed 20*l*. damages for trespass and a mandatory injunction. The headnote says: " At the " trial the county court judge intimated, in effect, that he " thought there had been a trespass, but he did not wish to put " the defendant to the expense of a mandatory injunction if it " could be avoided. The plaintiff thereupon abandoned his " claim to the injunction. The county court judge having " given judgment for the plaintiff for 15*l*. damages for the " trespass:—Held, that the plaintiff, having claimed the injunction in addition to the 20*l*. damages, might appeal from " the judgment without first obtaining the leave of the county " court judge, notwithstanding the provisions of the section." I say no more about that case than that it was not a claim for damages for nuisance (where the damages are an essential part of the cause of action as distinguished from trespass) and that it is not an authority which calls for our consideration in the present case.

The only question that arises in this appeal is whether, in an action or counter-claim for damages for nuisance, a claim for an injunction ancillary to that claim takes the case

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(1) [1898] 1 Q. B. 417.

(2) [1915] 2 K. B. 294.

Scott L.J.

out of the definite prohibition of s. 105, of the Act of 1934, that there shall be no appeal without leave "where the "damage claimed does not exceed 20*l.* ". In my judgment it would be wrong to read into that section a proviso that the addition of a claim for an ancillary injunction—the only kind of injunction which the county court can grant—will take the case out of the section although the counter-claim is for damages for nuisance not exceeding 20*l.* The exception, contained in proviso (*a*) of the section, of a cause of action where title comes in question has no relevance to the present appeal. For these reasons I think the objection ought to be upheld and the appeal dismissed with costs.

MACKINNON L.J. I agree. This is an appeal by the defendant complaining of the dismissal of her counter-claim. The objection is taken by Mr. Daynes that the appeal does not lie on the ground that the counter-claim was for nuisance, in respect of which the remedy asked for was 20*l.* damages and an injunction to abate the nuisance as an ancillary remedy. If that was a correct statement of the nature of the claim made in the counter-claim, the preliminary objection to the hearing of this appeal on the ground that the damages claimed were only 20*l.* would be a good one. Mr. Linton Thorp seeks to get out of that result by alleging that in addition to a claim for a nuisance made by the defendant in the counter-claim, there was involved in the pleadings some question of the title of the defendant to the wall, and he bases that solely on the use of the very ambiguous word " upon " in para. 2 of the counter-claim —the shed was built " upon an adjoining wall the property of " the defendant." That is a suggestion that there was a trespass, I suppose of a few inches, on the defendant's freehold, by building the shed on the top of the wall so as to overlap the boundary of the defendant's property. Having read the whole of the counter-claim, the judge's note, and the correspondence, I am quite satisfied that that interpretation of that ambiguous word " upon " is fallacious and misleading. The real truth is that " upon " meant " up against "—" up against an adjoining " wall, the property of the defendant." The passage goes on : " The said shed so built causes the said wall to be defective, " damp and unsound,"—that is to say, it is a nuisance. The next paragraph alleges that the plaintiff has bushes and other things there and a fig tree, and it goes on to say " the said " laurels and holly or other bushes and fig tree caused the wall to become defective, damp and unsound," which is exactly the allegation as regards the shed. " The defendant has verbally " requested the plaintiff to abate the nuisance complained of." That means, as I understand it, both the nuisance caused by the shed and by the bushes. Finally in the prayer of the counter-claim, one remedy asked for is: " An injunction restraining " the plaintiff from continuing to maintain and keep the said " wooden shed and laurels holly or other bushes and fig tree " so as to be a nuisance to the defendant." It appears to me, on that, that the real basis of the counter-claim was that the shed and the bushes both constituted a nuisance, and that when it said the shed was built " upon " the wall, it meant up against the wall. There never was any question as to the title to the wall. It was purely an allegation of nuisance by the shed and the bushes on the plaintiff's land. That being so, it was a claim by way of counter-claim solely for damages not exceeding 20*l.* for a nuisance. I agree that the preliminary objection succeeds, and that this appeal must be dismissed with costs.

MORTON L.J. This counter-claim was founded on tort. It was not an action for the recovery of land, and, in my view, for the reasons already given by the other members of the court, it was not an action in which the title to any hereditament had come in question. It was stated on the face of the counter-claim that the damage did not exceed 20*l.* Therefore, prima facie this claim comes within the proviso to s. 105 of the Act of 1934 and the preliminary objection that there is no appeal on it, the leave of the county court judge not having been obtained, succeeds. It is said, however, that, in so far as it is a claim for an injunction, the proviso does not apply. I express no view as to the position where the action is one founded on trespass, but in the present case the claim here is one for damages for nuisance and the injunction asked for is an ancillary remedy. In these circumstances I do not think that the counter-claim is saved from the operation of the proviso by the insertion of a claim for this ancillary relief.

I would only add that although I express no view on the correctness of the decision in *Dixon* v. *Brown* (1), because that was an action founded on trespass, I think that the observations of the Divisional Court in that case are expressed in terms which are too wide. The court there held that:

(1) [1915] 2 K. B. 294.

"The proviso to s. 120 of the County Courts Act, 1888, does not "apply where there is a claim for an injunction. The proviso "only applies where the claim is solely for debt or damages and "the claim does not exceed 20*l.*" In my view a statement in these extremely wide terms is not consistent with the judgment of this court in the present case. I agree that the preliminary objection succeeds, and that the appeal must be dismissed with costs.

Objection allowed.
Appeal dismissed.

Solicitors for defendant: *Theodore Goddard & Co., for Chittock & Chittock, Norwich.*

Solicitors for plaintiff: *Oldman, Cornwall & Wood Roberts, for Daynes, Keefe & Durrant, Norwich.*

H. G.

1945
June 25, 26;
July 2.

Humphreys and Croom-Johnson JJ.

REX *v.* THE KEEPERS OF THE PEACE AND JUSTICES FOR THE COUNTY OF LONDON.

Appeal—Licensing offence—Information by excise officer—Dismissal of information—Appeal by officer—Whether competent—"Person "aggrieved" by acquittal—Excise Management Act, 1827 (7 *&* 8 *Geo.* 4, *c.* 53), *s.* 82.

Where an excise officer has exhibited an information before a court of summary jurisdiction charging an offence against the licensing laws, and the information is dismissed, the excise officer is a person aggrieved by the judgment of the magistrate on the information, and by the terms of s. 82 of the Excise Management Act, 1827, is given a right of appeal to quarter sessions against the acquittal of the person charged.

APPLICATION for order of prohibition to appeals committee of county of London quarter sessions.

On October 3, 1944, the respondent, Edwin Percival Furber, an officer of excise, exhibited three informations before the chief magistrate at Bow Street police court, against the applicant alleging that on May 2 and 18, 1944, at 189 Regent Street, he did sell by retail intoxicating liquor without a licence contrary to s. 50, sub-s. 3, of the Finance Act, 1910, thereby rendering himself liable to the penalties prescribed. On November 24, 1944, the chief magistrate dismissed the informations and ordered the respondent to pay fifteen guineas costs. On December 1, 1944, the respondent gave notice of his intention to appeal to the county of London quarter sessions against the dismissal of the informations. The appeals came on for hearing before the appeals committee on June 10, 1945, when the applicant took a preliminary objection that the court had no jurisdiction to entertain them on the ground that no appeal lay from the decision of a magistrate dismissing an information. It was contended for the respondent that a right of appeal was given by s. 82 of the Excise Management Act, 1827 (1). The chairman intimated that the committee were of opinion that they had jurisdiction, but the hearing of the appeals was adjourned pending the hearing of the present application.

Slade K.C. and *Colin Duncan* for the applicant.
Valentine Holmes for the respondent.

Cur. adv. vult.

July 2. The following judgments were read:

HUMPHREYS J. (after stating the facts and reading the material provisions of s. 82 of the Excise Management Act, 1827, continued:) The respondent relied on s. 82 of the Excise Management Act, 1827, in support of his contention that he had a right of appeal and the question for our decision appears to depend almost entirely on the true construction of that section. There are, however, in my opinion, two general principles which have to be borne in mind. The first is that rights of appeal to quarter sessions are the creation of statute and that no such right can be implied. The second is that a right of appeal against the dismissal of a criminal charge is so unusual that it

(1) Excise Management Act, 1827, s. 82: "That in case any "officer of excise who shall exhibit "any information, or any person "or persons against whom any "information shall have been "exhibited, or who shall appear "and claim any goods, commodities, or chattels alleged to be "forfeited in any information "exhibited before the commissioners of excise, shall feel "aggrieved by the judgment given "thereon by such commissioners, "it shall be lawful for such officer, "or such person or persons, upon "giving such notice as hereinafter "mentioned, to appeal therefrom "to such commissioners of appeal "as aforesaid; and it shall be "lawful for such commissioners of "appeal, or the major part of "them, upon being served with "such notice, and they are hereby "respectively authorized and required, at such place and at such "time as they shall in that behalf "appoint, to hear, adjudge, and

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Humphreys J.

may be said to be a general rule that there is no such right. That this is so may be gathered from numerous decisions of the courts, but it is unnecessary, in my judgment, to refer to those decisions, with the exception of the latest in the House of Lords, *Benson* v. *Northern Ireland Road Transport Board* (1), where, after having examined the authorities, Viscount Simon L.C., in the course of his speech referred to the extremely important and universally accepted principle of our law which has been recognized again and again by the highest authorities both in England and Ireland. His Lordship continued (2): " Thus, " in *Regina* v. *Tyrone County Justices* (3) Palles C.B., in granting " certiorari to quash a conviction for trespassing in pursuit of " game, which was pronounced at quarter sessions on the hear-" ing of an appeal from justices who had dismissed the charge, " spoke of the ' elementary ' principle that ' an acquittal made " ' by a court of competent jurisdiction, although erroneous " ' in point of fact, cannot as a rule be questioned and brought " ' before any other court.' The Chief Baron went on to point " out that the statute 27 George 3, c. 35, which was then being " discussed, could not be construed to give an appeal to the " prosecutor in a criminal matter, for it contained no clear, " express words which provided for a departure from the " general rule, and he added, ' I, therefore, first rest my view on " ' settled principles, that, before you can appeal against an " ' acquittal, the words must be clear, express, and free from " ' any ambiguity '." After reference to some other authorities and in particular to the emphatic language of Lord Halsbury L.C., in *Cox* v. *Hakes* (4), where the Lord Chancellor insisted on the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty of appeal, Viscount Simon summed up his conclusion in these words: " In the light of the above pronouncements,

" finally determine such appeal; " and in case any officer who shall " exhibit any information, or any " person or persons against whom " any information shall have been " exhibited, or who shall appear " and claim any goods, commodities, or chattels alleged to be " forfeited in any information " exhibited before any justice or " justices of the peace as aforesaid, " shall feel aggrieved by the " judgment given thereon by such " justices, it shall be lawful for " such officer, or such person or " persons, upon giving such notice " as hereinafter mentioned, to " appeal therefrom to the justices " assembled at the next quarter " sessions of the peace . . . ."

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(1) [1942] A. C. 520.

(2) Ibid. 526.

(3) (1906) 40 Ir. L. T. 181.

(4) (1890) 15 App. Cas. 506, 522.

" very clear statutory language would be needed to establish, " by way of exception to the general rule, a right of appeal from " a decision dismissing a criminal charge."

On the other hand, Parliament not only can, but has, provided for such an appeal where it has been thought necessary in the public interest that it should exist. For instance, the Diseases of Animals Act, 1894, creates a number of offences which may be committed, and by s. 54 provides that all such offences may be prosecuted summarily, and then goes on, in s. 55, to enact as follows: " If any person thinks himself " aggrieved by the dismissal of a complaint by, or by any " determination or adjudication of a court of summary juris- " diction under this Act he may appeal therefrom to a court of " quarter sessions."

I proceed, therefore, to consider the language of s. 82 in order to see whether that very clear statutory language referred to by Viscount Simon L.C. as being needed to establish a right of appeal is to be there found. It cannot, I think, be disputed, nor did Mr. Slade for the applicant contend to the contrary, that some right of appeal to quarter sessions is given by the section to an officer of excise who has been unsuccessful in the court of summary jurisdiction, but Mr. Slade contends that the language of the section is satisfied by holding that the only appeal so given is one against a refusal to admit a claim to goods made by the excise, and he refers us to s. 83 in support of that contention. It is true that that section, which deals primarily with notices, mentions only notices of appeal against condemnation or refusal to condemn goods, chattels and commodities alleged to be forfeited, and appeals against conviction for penalties, but the section is in the form of a proviso to s. 82, and in my opinion is not in the least inconsistent with the contention that s. 82 does apply to penalties incurred as well as to claims to goods. We were referred to numerous other sections of the Act, but I find nothing in any of them to alter or interfere with what I regard as the very plain language of s. 82. I ask myself what can be the meaning of these words: " In case " any officer who shall exhibit any information shall feel " aggrieved by the judgment given by such justices thereon," unless they include the case of an officer who has exhibited an information asking for penalties against a person who has been acquitted? Mr. Slade further contends that an unsuccessful officer of excise cannot be a person who " feels aggrieved " by a judgment against his contention. The short answer to

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that argument is, in my opinion, that Parliament has said in terms that an officer who has exhibited an information may "feel aggrieved" by the judgment of the court of summary jurisdiction, which, to my mind, must include a judgment of acquittal. The rest of Mr. Slade's argument, if I have followed it correctly, was concerned to show that various sections of this Act, together with some other Acts and authorities relied on by the Crown, were not inconsistent with his contention.

Mr. Valentine Holmes, representing the excise authorities, suggested that excise penalties may be regarded somewhat differently from penalties imposed merely for the purpose of punishment. It may be said, perhaps, that the imposition of excise penalties is merely a method of collecting the King's revenue, and he has drawn our attention to the state of the law as it existed in 1827, though since altered by various modern statutes. Excise penalties were originally only recoverable by proceedings in the Court of Exchequer and they may still be sued for in the King's Bench Division of the High Court of Justice as the successor of that court. In 1827, for the first time, so far as I am aware, such penalties were made recoverable summarily—in London, at the chief office of excise as created by s. 14 of the Act of 1827, the procedure being by information laid before three commissioners of excise; in all other districts by information before justices of the peace—see s. 65. The commissioners did not constitute a court in the sense in which that term is generally understood, but they appear to have had precisely the same powers in regard to the imposition of penalties and condemnation of goods seized as had the justices. Section 81 created a tribunal called commissioners of appeal by whom appeals from the three commissioners were to be heard. This tribunal, again, seems to be lacking in most of the attributes of a court, but is given by s. 82, as originally enacted, the power to hear and determine any appeal from the three commissioners brought by (1) any officer of excise who shall have exhibited any information, (2) by any person against whom an information has been exhibited, or (3.) any other person claiming the goods alleged in the information to be forfeited who shall feel aggrieved by the judgment of such three commissioners, and the commissioners of appeal were required to hear, adjudge and finally determine such appeal. This first portion of s. 82 has been repealed together with s. 81 and so much of s. 65 as related to the powers of the three commissioners in the London district; the remaining portion of s. 82, conferring the right of appeal to quarter sessions, appears to be in precisely the same terms mutatis mutandis as the repealed portion. It is argued that there could have been no impropriety in giving the officer mentioned in the first part of the section the right to appeal from a dismissal to the tribunal specified, and there is no ground for assuming that his rights under the latter part of the section were any less extensive. All these matters are no doubt relevant in considering whether s. 82 does create a clear and unmistakable right of appeal in the excise officer, but I repeat that in my opinion the question must ultimately be decided on the language of s. 82 itself.

Mr. Holmes was further instructed to inform the court that during the hundred and eighteen years which have elapsed since the passing of the Act of 1827 there have been numerous appeals to quarter sessions under s. 82 by excise officers who have felt aggrieved by the dismissal of their informations, and, so far as the records of the excise show, in no case has the right of appeal ever been challenged. Some of those cases have found their way to the Court of Exchequer and have been reported. There are at least two cases in England where the absence of any challenge to the right of appeal is, in my judgment, inexplicable if the point is a good one. The first is *Reg.* v. *Woodrow* (1). That was a case in the Court of Exchequer argued by Wilde for the Crown and Crompton contra, the judges being Pollock C.B., Alderson B. and Rolfe B. The case raised a point as to the sufficiency of notices of appeal to quarter sessions under s. 83 of the Act of 1827, and involved a consideration by the court of ss. 82 and 83. I find it difficult to believe that judges and counsel of such eminence overlooked the question whether an appeal lay, the case being one in which an officer of excise, by whom an information for penalties had been exhibited, had appealed to quarter sessions against the dismissal of the information. Had the point as to the right of appeal been considered even arguable, it must have been taken, since, if successful, it would have disposed of the case.

The next case, *Reg.* v. *Gamble* (2), is, I think, even stronger. There, the justices convicted on the fourth count of an information and acquitted on three others. The defendant gave notice of appeal from the judgment on the fourth count to quarter sessions, but the excise officer gave no notice of appeal against the judgment of acquittal on the three counts, and

(1) (1846) 15 M. & W. 404.

(2) (1847) 16 M. & W. 384, 415.

it was held that no judgment could be given by the court of quarter sessions for the excise officer on the second count although, in the opinion of the court, the defendant ought to have been convicted on that count, since the officer had not exercised his undoubted right to appeal from the acquittal on that count. The judgment of the court was delivered by Pollock C.B., who said in the course of it: "The learned "recorder appears to have doubted his power to go into the "case on any other count than the fourth and we think his "doubt in that respect was well founded. The judgment of "the convicting justices being against the information as to "three of the counts contained in it, it was as open to the officer "to appeal against that part of their judgment, as to the defen-"dant to appeal against their judgment on the fourth count, "which was adverse to him, but the defendant alone "appealed." A little later he said: "As the officer did not "avail himself of that power to appeal against it" (an acquittal) "in order to obtain a conviction, which is expressly given him "by the same section" (s. 82) "the defendant would naturally "go before the quarter sessions prepared only to refute the "charge against him on the fourth count, which might have "been of a character totally different from that laid in the "other counts. In the absence of any notice of appeal against "the judgment in his favour on the first three counts, he may "reasonably he supposed to have relied on that judgment as "binding on the prosecutor. If the Crown wished to rely on "any other count besides that on which the justices had "convicted, their officer had a perfect right to appeal, in "respect of the counts, or any of them, upon which the "defendant had been acquitted." If that decision is not actually conclusive of this case, it so clearly expresses the view held by the Chief Baron of the Exchequer on the very question arising for our determination that I should be very loth to differ from so eminent an authority on the point, but, as already stated, my own opinion coincides with that of the Chief Baron.

Mr. Holmes also referred us to *Reg.* v. *McFeely* (1), in which the court held that an officer of excise who had prosecuted a person for an offence against a Customs Act had no right of appeal to quarter sessions against an acquittal. The argument and the judgment appear to assume that he would have had such a right if the penalty had been incurred under the Excise Act. Mr. Holmes took certain other points to which I think it unnecessary to refer, except to say that the language of s. 10, of the Customs Inland Revenue and Savings Bank Act, 1877, does seem to assume the existence of a power of appeal to quarter sessions against an acquittal, at least in Ireland, but I think the section is principally relevant as an answer to any attempt to distinguish between a dismissal and an acquittal. On the whole I am of opinion that the right of appeal in question here is given in such clear and definite terms as to leave no doubt on the matter. I think the prohibition asked for should be refused.

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(1) (1844) 7 Ir. L. R. 395.

Croom-Johnson J. I agree with the judgment of my brother Humphreys, but as the question is one which is of some importance, and counsel for the applicant seems to have suggested that we are bound by a recent decision of the House of Lords to decide in his favour, I think it desirable to express my reasons in my own words. I need not state the facts again. It is enough to say that the applicant, by the leave of this court, applies for an order of prohibition directed to the justices of the appeals committee of the county of London quarter sessions "prohibiting them from hearing or determining the said appeal "on the ground that they have no jurisdiction to hear or "determine the said appeal because it is against the said "dismissal of the said information." Included in the general grounds of such appeal was one, numbered (3.): "That the "applicant was guilty of the offences charged in the said "informations and should have been convicted." The appeal in question being from a court of summary jurisdiction, it was accepted by both parties that an appeal does not lie unless given expressly by statute and cannot be given by implication only. (See *Reg.* v. *Stock* (1).)

The right to appeal with which we are concerned arises, if at all, from s. 82 of the Excise Management Act, 1827 (which I will call the Act), which, according to its long title, was "An Act to consolidate and amend the laws relating to the "collection and management of the revenue of excise through-"out Great Britain and Ireland," and which was "to be "deemed and taken to apply to all Acts of Parliament relating "to the revenue of excise which shall hereafter be made" except where otherwise specially directed or provided (s. 3). Before that Act the Crown could apparently sue for and recover duties of excise and penalties connected therewith in England in the Court of Exchequer, a right which, so far as penalties and condemnation of goods, commodities and chattels seized as forfeited were concerned, was preserved by s. 57 of the Act of 1827. That Act set up a board of commissioners of excise to sit at the chief office of excise established in London (ss. 1, 14). It envisaged claims by the proprietors of such goods so seized as forfeited (s. 62). It then provided for a new and permissive procedure in cases arising within the limits of the chief office by information before any three or more commissioners of excise or before justices of the peace in cases arising out of the limits of the said chief office (s. 65). In the former case, a right of appeal was given to commissioners of appeal appointed under s. 81 and in the latter to quarter sessions (s. 82). A general power to mitigate penalties was conferred on the commissioners and on justices (s. 78). The appeal commissioners were swept away in 1841, and an appeal from the commissioners of excise to the Court of Exchequer substituted by 4 and 5 Vict., c. 20, ss. 25, 26, in chief office cases. In such cases, concurrent jurisdiction was later given to metropolitan police magistrates, and this is now the normal procedure. It was not contended that the position in this matter of a single metropolitan magistrate is any different from that of two or more justices sitting elsewhere in petty sessions. I have referred to the original two jurisdictions, since it might have been a possible view that the present case arose out of a civil or quasi-civil remedy, but the point has not been raised or argued before us, and I therefore express no opinion on it. The case has been dealt with throughout by both sides as if the proceedings at Bow Street were criminal proceedings.

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(1) (1838) 8 A. & E. 405.

It was admitted by Mr. Slade on behalf of the applicant that s. 82 gave a right of appeal to quarter sessions from justices to an excise officer, and (in his final address) even from a dismissal on certain matters: The question debated before us was how far does that right extend? Does it cover the case of an appeal against what was called a clean acquittal, that is, an out and out acquittal or dismissal? On behalf of the applicant it was argued that the language of the section did not give such an extensive right of appeal to the excise officer. The basis of the contention was (1.) the rule that there is no right of appeal by a prosecutor against a dismissal, since as representing the Crown he cannot, nor can anyone else, be aggrieved because someone is held not to have done wrong—per Lord

Coleridge C.J., in *Regina* v. *London County Justices* (1), and (2.) the further rule that " very clear statutory language would " be needed to establish, by way of exception to the general " rule, a right of appeal from a decision dismissing a criminal " charge "—per Viscount Simon L.C. in *Benson* v. *Northern Ireland Road Transport Board* (2). We were referred to a number of other decisions showing the application of the general rule to which I have referred, but in view of the review of the authorities by the Lord Chancellor (3), in his speech in the case last referred to, I see no useful purpose in examining them for the purposes of this judgment. I accept the two general rules to which I have referred and I direct myself accordingly. I inquire, therefore, whether the language of s. 82 of the Act of 1827 is sufficiently clear to establish the full and exceptional right of appeal which is in question.

The relevant portion of s. 65 of the Act, as unrepealed, is as follows : " That for the recovery of any penalty imposed by this " Act, or any other Act or Acts of Parliament relating to the " Revenue of Excise, and incurred for or by reason of any " offence committed against this Act, or the said other Acts or " any of them, or for the condemnation of any goods, commodi- " ties, or chattels seized as forfeited under or by virtue of this " Act, or the said other Acts or any of them, where the offence " shall have been committed, or the person or persons com- " mitting the same shall be found, or where the goods, " commodities, or chattels shall have been seized as aforesaid, " within the limits of the Chief Office of Excise in London, an " information thereupon may be exhibited before, and be heard, " adjudged, and determined by any three or more of the " commissioners of excise ; and where the offence shall have " been committed, or the person or persons committing the " same shall be found, or where the goods, commodities, or " chattels shall have been seized as aforesaid, in any part of " the United Kingdom out of the limits of the said chief office, " the information thereupon may be exhibited before any one " or more of His Majesty's justices of the peace for the county, " shire, division, city, town, or place wherein the offence shall " have been committed, or the person or persons committing " the same shall be found, or where the goods, commodities, " or chattels shall have been seized as aforesaid ; and such " information shall and may be heard, adjudged, and

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(1) (1890) 25 Q. B. D. 357, 361.

(2) [1942] A. C. 520, 526, 528.

(3) Ibid. pp. 526 and 528.

" determined by any two or more of His Majesty's justices of " the peace for the said county, shire, division, city, town, or " place . . . ." It is to be observed that the language of s. 82 is " in case any officer who shall exhibit any information " . . . . shall feel aggrieved by the judgment given *thereon* " by such justices . . . . it shall be lawful for such officer " . . . . to appeal therefrom "—words which would seem, apart from authority, to be tolerably plain. Section 83 deals with a case where the judgment appealed against shall be either *for or against* the condemnation of any goods seized as aforesaid, in which case the goods are to be deposited meantime. It is a proviso to s. 82, and seems to recognize the right to an appeal by the excise officer at least so far. Section 84 gives power to the justices in quarter sessions to make a new or different judgment with power to mitigate the penalty, which is consistent with the right of appeal now in question ; and s. 85 provides for the enforcement of another or different judgment where the original judgment is reversed. No express mention is made in either of those two sections of an appeal being against what has been called a clean acquittal. On the other hand, the words " for or against " in s. 83 seem to indicate the possibility of an appeal in a case of acquittal at least in part, and the power to mitigate may lead to the same result. It is not easy to see why this express power to mitigate a penalty could be needed in the case of a new or different judgment unless quarter sessions were ordering a penalty for the first time, that is, the appeal was against an acquittal. I do not think the language of those three sections, however, can be said to be any more helpful than being not inconsistent with the full right of appeal suggested to exist.

For the past hundred and eighteen years, we have been told, appeals to quarter sessions by excise officers under s. 82 have been heard and determined without objection by anybody, and apparently this is the first case in which the point has been taken that they had no right to appeal in a case of acquittal. All the text-books dealing with the subject assume the contrary. There is no authority either way, but in three cases the existence of such a right has been assumed ; they are *Reg.* v. *Woodrow* (1), *Reg.* v. *Gamble* (2) and *Reg.* v. *McFeeley* (3). I adopt my brother's analysis of these cases, contenting myself with saying that in the first of them the appeal was by an excise

(1) 15 M. & W. 404.
(2) 16 M. & W. 384.
(3) 7 Ir. L. R. 395.

officer against a dismissal of an information by the justices. The court was engaged in an examination of the question whether due notice of the appeal had been given for reasons which it is unnecessary to elaborate, and the point now before us does not seem to have occurred either to the strong court which decided the case or to the experienced counsel who argued it. The last of these cases also dealt with an appeal against a dismissal, and the point successfully argued was that the right of appeal by the excise officer did not extend to a case of a penalty in respect of a customs matter as distinct from an excise one.

By the Excise Revenue Management Act, 1834 (4 & 5 William IV., c. 51), ss. 23 and 24, provision is made as to appeals as follows: s. 23: " . . . . any notice of appeal " shall be given by any officer of excise who shall attend and " conduct the proceedings on the part of the revenue of excise, " notwithstanding such officer may not be the officer named in " the information as informing or exhibiting the same; and " it shall be lawful for any court of quarter sessions before whom " any appeal shall be brought to adjourn the hearing thereof " to the next quarter sessions, then to hear and finally to " determine the same." Then s. 24: " . . . . where the " commissioners of excise or justices of the peace respectively " before whom any information shall be exhibited shall dismiss " such information without examination of witnesses, or shall " refuse to examine any witness produced on the hearing of any " information, the several witnesses refused to be examined " shall be tendered to the said commissioners or justices " respectively for examination on the part of the informer or " defendant, as the case may be, and the said commissioners or " justices respectively shall, on ascertaining the witnesses so " tendered for examination to be present, cause their names to " be taken down in writing, and shall transmit the same with " the information and judgment to the commissioners of appeal " or quarter sessions respectively; and the several witnesses so " tendered for examination, and whose names shall be so " transmitted, shall on the hearing of the appeal be examined in " the case, although not examined before the commissioners or " justices on the original hearing and judgment."

We were referred to the Customs and Inland Revenue and Savings Bank Act, 1877, s. 10. The original statute applied to Ireland, and s. 10 seems to me to recognize beyond question that in Ireland at least the section extended to cover cases of acquittal.

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Croom-Johnson J.

Finally, our attention was directed to the language of two sections which give a right of appeal in express terms from an order of dismissal of complaint, with a view, as I understand, of showing what sort of language we ought to look for in the present case, and so that we might compare the different sections. These were the Diseases of Animals Act, 1894, s. 55, and the Railway Rolling Stock Protection Act, 1872, s. 6, which speaks of "by dismissal of complaint." The language used is certainly different from that used in s. 82, but it does not lead me to the view that the language of s. 82 is thereby shown to be insufficiently plain or precise. I have come to the conclusion that the language used in s. 82 plainly confers on the officer who exhibited the information (subject to s. 23 of the Act of 1834) and who is aggrieved by the judgment given on his information, the right to appeal against that judgment, whatever the judgment may be. Accordingly in my judgment the court of quarter sessions had jurisdiction to entertain the appeal, and this application for an order of prohibition should be dismissed.

Application refused.

Solicitors for applicant: *Philip Conway, Thomas & Co.*
Solicitor for respondent: *Solicitor for Customs & Excise.*

P. B. D.

C. C. A.

1945

July 9.

Wrottesley, Croom-Johnson and Birkett JJ.

REX v. HAMID.

Criminal law—Carrying on business of dealing in securities without a licence—Inducing subscription to shares in company not yet in existence—"Securities"—Prevention of Fraud (Investments) Act, 1939 (2 & 3 Geo. 6, c. 16), s. 1, sub-s. 1 (a); s. 26, sub-s. 1.

The offence of carrying on the business of dealing in securities without a licence, contrary to s. 1, sub-s. 1 (*a*), of the Prevention of Fraud (Investments) Act, 1939, is committed by one who, having no such licence, attempts to induce any person to subscribe money for the share capital of a company to be formed subsequently.

APPLICATION for leave to extend time for appealing against conviction.

The applicant, Richard Hamid, was convicted at the London quarter sessions on February 22, 1945, of unlawfully carrying

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on the business of dealing in securities without having obtained a principal's licence, contrary to s. 1, sub-s. 1 (*a*), of the Prevention of Fraud (Investments) Act, 1939 (1). The applicant had no such licence. He had written letters to three different persons inviting them to subscribe money towards the share capital of companies to be formed, but not then in existence, and was fined 300*l*. The conviction was on February 22, 1945, but the sentence was not pronounced by the court until April 11, and consequently notice of appeal was not given until after that date, and was out of time.

Lester for the applicant. By s. 26, sub-s. 1 (*a*), securities are defined as "shares . . . . or rights or interests . . . . in any "shares." That must mean shares in existing companies. The letters written by the applicant were referring to shares in companies not then in existence. Had the legislature intended to include such future companies it could easily have added "in companies intended to be incorporated." This is a penal statute and should be strictly interpreted.

WROTTESLEY J. delivered the judgment of the court. The conviction of the applicant rested on three different transactions or letters issued by him, which were invitations to the persons to whom the letters were addressed to subscribe money towards the share capital of companies to be formed. The point of law adumbrated by counsel for the applicant was that since the invitation related to a company not yet formed, it was a transaction not covered by the Act under which the indictment was framed, for this reason, that if certain definitions to be found in s. 26 of the Act are looked at the language used shows that the restrictions

(1) Prevention of Fraud (Investments) Act, 1939, s. 1, sub-s. 1: ". . . . no person shall . . . . "(*a*) carry on or purport to carry "on the business of dealing in "securities except under the "authority of a principal's "licence . . . ."

Section 26, sub-s. 1: ". . . . "'dealing in securities' means "doing any of the following "things (whether as a principal or "as an agent), that is to say, "making or offering to make with "any person, or inducing or "attempting to induce any person "to enter into or offer to enter into "(*a*) any agreement for, or with a "view to acquiring, disposing of, "subscribing for or underwriting "securities . . . . 'Securities' "means shares or debentures, or "rights or interests . . . . in any "shares or debentures. 'Shares' "means shares in the share capital "of a corporation or stock of a "corporation. 'Principal's licence' "means a licence authorizing the "holder thereof to carry on the "business of dealing in securities."

imposed and the offences created by that Act were confined to companies already in existence. If that had been so, it would have been somewhat remarkable, because the obvious scope and intention of this Act is to protect the public by ensuring that persons who invite them to part with their money for the purpose of dealing in securities, to use the language of the Act, should be persons of substance, and it is just as desirable—it is conceivable that it is even more desirable—that you should only have persons of substance doing such business if the transaction should be in relation to a company not even registered. The applicant's counsel pointed out that this is a criminal matter, and therefore, if the language should lead to such a technical conclusion, the court would be bound by it. We look at the language, and the language in question amounts to this: The charge is "carrying on the business of dealing "in securities," and we find that "dealing in securities" is defined in the definition section of the Act, and it means "doing any of the following things: (whether as a principal "or as an agent), that is to say, making or offering to make "with any person, or inducing or attempting to induce any "person to enter into or offer to enter into (*a*) any agreement "for, or with a view to acquiring, disposing of, subscribing for "or underwriting securities." That language sufficiently indicates the scope of the Act. It will be observed that the word "securities" is also defined, and the result of the definition must be incorporated in the definition I have read. The definition of "securities" is: "shares or debentures, or "rights or interests . . . . in any shares or debentures." Finally the word "shares" itself is defined as meaning: "shares in the share capital of a corporation or stock of a "corporation," and from that counsel asks us to conclude that this Act is confined to dealing in shares of an existing corporation. But when we look at the definition of "dealing "in securities" we see it is extended, if necessary, to include these matters "making or offering to make with any person, "or inducing or attempting to induce any person to enter into "or offer to enter into (*a*) any agreement for, or with a view to "acquiring, disposing of, subscribing for or underwriting "securities." From this it is clear to us that no intention was in the mind of the draftsman, or the legislature, of confining the operation of this Act to carrying on business which related to existing companies only or, for the matter of that, existing securities. Therefore, that point by itself would fail.

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Apart from that, we have asked for and have not received, because it is not possible to give it to us, any reason to support the suggestion that this Act is to be read in the confined sense argued for on behalf of the applicant. That being so, we feel that there are no matters which would justify the court in extending the time for appeal in this case now that we know what are the merits of the points of law alleged. The application is therefore not granted.

Solicitors for applicant: *Bein & Lawrence.*

W. L. L. B.

SMITH *v.* NATIONAL METER COMPANY, LIMITED, AND OTHERS.

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Mar. 7, 8; *Apr.* 16.

Uthwatt J.

Defamation—Libel—Employer and employee—Industrial disease—Claim for compensation—Employer's insurers—Insurers' letter to proposed medical referee—Privilege—Malice of employers—Joint liability of insurers—Appointment of referee—Invalidity—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*f*), *sched. III.* 12*a—Medical Referees in England and Wales Regulations* (*St. R. & O.*, 1932, *No.* 960), *reg.* 25.

The insurers of employers against claims for compensation under the Workmen's Compensation Act, 1925, having applied to the Registrar to refer a claim for compensation for an industrial disease to a medical referee, sent a letter to Dr. McC. as such medical referee, in which they suggested that the claim was not a genuine one. The employee brought an action for libel against both her employers and the insurers, and the court found that the letter was defamatory of her. The defendants pleaded privilege:—

Held, that proceedings before a medical referee are not proceedings before a tribunal exercising judicial functions, and are therefore not protected by absolute privilege.

Held further that assuming that the letter was protected by qualified privilege, the employers being actuated by malice could not avail themselves of that plea, and that the insurers having written it as agents of the employers, were jointly liable with them for the libel, even if the insurers were not themselves actuated by malice.

Smith v. *Streatfield* [1913] 3 K. B. 764, followed.

ACTION.

The plaintiff, who had been employed by the defendant company on munition work, was certified by the examining surgeon, on January 22, 1943, to be suffering from " dermatitis

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"produced by dust or liquid." She recovered from this attack, but on February 6, in consequence of another attack of dermatitis, gave up her work with the company. On February 8, she sent the company a medical certificate that she was suffering from acute dermatitis, and claimed compensation. The defendant company's works manager on February 9 sent a memorandum in writing on the claim, which was found by the learned judge to be defamatory of the plaintiff, to the secretary of the company, stating that the claim was not a genuine one, with a copy which was intended to be, and was, sent on to the company's insurance brokers.

The company having filed an application for the appointment of a medical referee, a letter to a similar effect was sent on February 19 by the insurers, a Lloyd's syndicate, represented by the defendant Gibson, to Dr. MacCormac, whom it was proposed to appoint as referee, and who, the insurers believed, had been so appointed. The plaintiff (amongst other claims) claimed damages for libel contained in this letter against both the company, and the defendant Gibson, representing the insurers. The defendants pleaded that the letter sent to Dr. MacCormac was absolutely privileged, or in the alternative, that it was protected by qualified privilege. The defendant Gibson further pleaded that he was not affected by proof of any malice on the part of the company, or its works manager.

Beney K.C. and *Dare* for the plaintiff. The statements complained of are defamatory and the defendants do not allege that they are true. Their main defence to the publication to the medical referee is that it was made on an occasion of absolute privilege, having been made in the course of judicial proceedings. The medical referee is not, however, a judicial tribunal, although he may have to exercise a judicial function, and any statements made to him in the course of his duties can only be the subject of qualified privilege. In this case, however, there is not even qualified privilege, as the medical referee was not appointed within the time limited by the rules. If it be held, however, that the occasion was one of qualified privilege there is ample evidence of malice on the part of the employers, and the insurers, as agents of the employers, are jointly liable.

The following cases were referred to—*Royal Aquarium, &c.* v. *Parkinson* (1); *Smith* v. *Streatfield* (2); *Rex* v. *Postmaster-*

(1) [1892] 1 Q. B. 431. (2) [1913] 3 K. B. 764.

General (1); *Rex* v. *Woodhouse* (2); *Lacey* v. *Wallis & Sons, Ld.* (3); *Conroy* v. *Thomas Wilkinson & Sons, Ld.* (4); *Hill* v. *Ladyshore Coal Co., Ld.* (5); *Hebditch* v. *McIlwaine* (6).

Colin Duncan and *Anthony Gordon* for the National Meter Co. The employers honestly believed that the statements made in the letter sent to the insurers were true, and they are covered by privilege. The letter sent to Dr. MacCormac, who was believed by all to have been appointed as medical referee, is absolutely privileged, as a statement made in the course of judicial proceedings.

G. O. Slade K.C. and *R. Marven Everett* for the defendant Gibson, representing the insurers. There is no evidence of any malice on the part of the insurers, and no malice of the employers can be imputed to them. They were not the agents of the employers in any way. They had contracted to insure the employers against claims for workmens' compensation, and they were informed, and believed, that this was not a genuine claim. The proposition in *Smith* v. *Streatfield* (7) to the effect that the printer and publisher of a libel are joint tortfeasors, each liable for the malice of the other, has been seriously doubted by the Court of Appeal in *Crozier* v. *Wishart Books, Ld.* (8), where, however, it was unnecessary to decide whether the decision was or was not correct. The appeal to the medical referee is a proceeding in the course of a judicial inquiry, and statements made to him by the parties are absolutely privileged. In any case, if the defendants all reasonably believed that Dr. MacCormac had duly been appointed medical referee, as they did, that is sufficient to give qualified privilege, which will protect these defendants And see *Attwood* v. *Chapman* (9); Gatley on Libel and Slander, 3rd ed., p. 269.

Beney K.C. replied.

Cur. adv. vult.

UTHWATT J. in a written judgment, having held that the purported appointment of Dr. McCormac as medical referee was in fact invalid, as having been made out of time, and dealt with the memorandum of February 9, and the letter of February 19 which he held to be defamatory of the plaintiff and certain other issues which do not call for report, continued :

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(1) [1928] 1 K. B. 291.
(2) [1906] 2 K. B. 501.
(3) (1926) 19 B. W. C. C. 43, 48.
(4) (1938) 31 B. W. C. C. 18.
(5) (1936) 29 B. W. C. C. 255.
(6) [1894] 2 Q. B. 54.
(7) [1913] 3 K. B. 764.
(8) [1936] 1 K. B. 471, 475.
(9) [1914] 3 K. B. 275.

The next question is whether the insurers were the agents of the company in writing the letter of February 19, 1943. In my opinion they were. Under the terms of the policy effected by the company with them, the insurers were entitled, if they desired, " to conduct any negotiations or " any legal proceedings of any nature " and it is apparent that in agreement with the company they exercised that right and took full charge of the matter from the moment the occurrence supposed to give rise to the employer's liability was brought to their notice. They had no locus standi to apply to the county court registrar for an extension of time for appealing, or to appeal or to write anything to the referee, except as representing the company, who were entitled under reg. 31 of the regulations as to medical referees to make a statement to the medical referee. Despite the phrasing of parts of the letter, it would be neglecting the realities of the case to treat the letter as anything other than a letter written by them as such agents. The company supplied material bearing on the case for use by the insurers as they thought fit. Both the company and the insurers proceeded on the footing that the insurers were the company's agents in the matter. Nor is the agency of the insurers affected, in my opinion, by the fact that the appointment of the medical referee was a nullity. The general question need not be considered, for the insurers informed the company that the appeal was out of time. Despite that, the matter was allowed to proceed. Taking this view of the matter, the company and the defendant Gibson are jointly responsible for the letter. I impute malice to the company. Unless, therefore, absolute privilege attached to the occasion on which it was written, both the company and Gibson are liable. Whatever view I may entertain as to the correctness of the decision in *Smith* v. *Streatfield* (1)—a tottering authority—I am bound as a judge of first instance to follow it. That decision renders it unnecessary for me to come to any conclusion on the question of malice in the insurers, a question which in this case is only an inference from the facts I have found.

It was argued that absolute privilege attached to the letter

(1) [1913] 3 K. B. 764.

of February 19, on the ground that it was a statement made in the course of proceedings before a tribunal exercising judicial functions. I have already stated the functions of the medical referee and I propose to discuss the matter on the basis that a medical referee was duly appointed. Are the proceedings before a medical referee proceedings before a tribunal exercising judicial functions, so as to confer absolute privilege on statements submitted to the referee by the parties? The principle on which absolute privilege rests in the general case of proceedings before courts is stated in *Munster* v. *Lamb* (1), and the limits of the application of that principle to other tribunals are stated in *Royal Aquarium, &c.* v. *Parkinson* (2), where Lord Esher said: " It is true that, in respect of statements " made in the course of proceedings before a court of justice, " whether by judge, or counsel, or witnesses, there is an absolute " immunity from liability to an action. The ground of that " rule is public policy. It is applicable to all kinds of courts of " justice; but the doctrine has been carried further; and it " seems that this immunity applies wherever there is an " authorized inquiry which, though not before a court of " justice, is before a tribunal which has similar attributes. " In the case of *Dawkins* v. *Lord Rokeby* (3) the doctrine was " extended to a military court of inquiry. It was so extended " on the ground that the case was one of an authorized inquiry " before a tribunal acting judicially, that is to say, in a manner " as nearly as possible similar to that in which a court of justice " acts in respect of an inquiry before it. This doctrine has " never been extended further than to courts of justice and " tribunals acting in a manner similar to that in which such " courts act."

I do not think that the tribunal here satisfies the tests laid down by Lord Esher in that case. The function of the medical referee is certainly not administrative. His decision certainly affects legal rights; but that is not the test. He has to determine several facts which, apart from statutory provision, would be decided by the courts on evidence. In ascertaining facts he is not bound by the strict rules of evidence. He has to do his best on the materials before him. (See *Chuter* v. *J. J. Ford & Sons, Ld.* (4).) He is bound to consider the statements made by the parties and to attach to them such

(1) (1883) 11 Q. B. D. 588, 604, 605.

(2) [1892] 1 Q. B. 431, 442.

(3) (1873) L. R. 8 Q. B. 255, affd. (1875) L. R. 7 H. L. 744.

(4) [1915] 2 K. B. 113, 119.

value as he may think they deserve. In determining some preliminary and incidental matters, his medical skill and knowledge may perhaps play a small part. But the substance of the task of the medical referee is to determine, on his own professional judgment and skill, medical facts. Again, in one important aspect the proceedings differ fundamentally from a judicial proceeding. Each party is entitled to submit a statement, and a statement is made to the referee alone. Neither party is entitled to know what is therein alleged by the other. It is impossible to imagine anything less likely to find a place in a judicial proceeding. (See the observation of du Parcq L.J. in *Boswell* v. *Partridge Jones & John Paton, Ld.* (1).) Public policy, so far from requiring that absolute privilege should attach to voluntary statements made in these circumstances, seems to me to demand the contrary. I have no doubt that qualified privilege attaches to those statements, with the result that an honest statement is protected. That protection is all that is required for the full and proper exercise of the functions committed to the medical referee. The protection given by absolute privilege would be a hindrance, not a help.

I hold that absolute privilege does not attach to statements submitted to a duly appointed referee. It follows that no absolute privilege could attach to the letter of February 19, 1943; and it is unnecessary for me to deal with the complication resulting from the fact that Dr. MacCormac's appointment was a nullity. I merely observe that there is much to be said for the view that a state of affairs had been brought into existence which would result in qualified privilege attaching to the letter in question. I give judgment for the plaintiff and assess the damages in respect of each of the first two libels at twenty guineas and in respect of the third libel at fifty guineas.

Solicitors: *W. H. Thompson; Bower, Cotton & Bower, for T. W. Stuchbery & Sons, Maidenhead; Hewitt, Woollacott & Chown.*

H. L. L.

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(1) [1941] 2 K. B. 305, 306.

SHERWOOD *v.* COX.

1945

May 3, 4.

Atkinson, Wrottesley and Tucker JJ.

Food and drugs—Adulteration—Service of copy of certificate of analysis —" Any certificate "—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 80, *sub-s.* 3.

On a charge of selling milk not of the nature, substance and quality demanded, the words " any certificate of analysis " in s. 80, sub-s. 3, of the Food and Drugs Act, 1938, mean only any certificate relating to the milk the subject-matter of the charge, and do not include a certificate taken under s. 70, sub-s. 2, for the purposes of meeting a defence that the contravention of the statute was due to the default of another person. A copy of the latter certificate need not, therefore, be served with the summons under s. 80, sub-s. 3.

CASE stated by Berkshire justices.

At a court of summary jurisdiction sitting on August 29, 1944, at Faringdon, an information was preferred by Bertram Sherwood (" the appellant ") under the Food and Drugs Act, 1938, against Francis Robert Cox (" the respondent ") for that he, on July 17, 1944, at Shrivenham, in the said county, did sell to the appellant and to his prejudice a pint of new milk which was not of the nature, substance and quality demanded by the appellant, being deficient in indicated proportions in milk fat.

The following facts were proved or admitted: When the summons was served on the respondent on August 14, 1944, there was also served on him a copy of the certificate of the public analyst (numbered 7582) of his analysis of the sample, the subject of the information, taken on July 17, in accordance with s. 80, sub-s. 3, of the Food and Drugs Act, 1938 (1). The sample had duly been divided into three parts as required by the statute, and certificate No. 7582 related to that sample. On July 19, 1944, two days after the aforesaid sample was taken, the appellant, in order to meet a possible defence that the contravention was due to the act or default of another person under s. 83, sub-s. 1, took a further sample of the respondent's milk, in accordance with s. 70, sub-s. 2. A copy of the certificate of the public analyst relating thereto (numbered 386) was not served on the respondent with the summons, but was sent to him by registered post on August 21, 1944, by the appellant's solicitor with a covering letter, saying that he proposed to adduce the certificate in evidence at the hearing.

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(1) Food and Drugs Act, 1938 (1 & 2 Geo. 6, c. 56), s. 70, sub-s. 2: " A person taking a sample of any " food while it is in transit, or at " the place of delivery to the pur- " chaser, consignee or consumer " shall, if he intends to submit it to " be analysed by a public analyst, " deal with it in the manner pro- " vided by the preceding " sub-section, except that he shall " retain the first-mentioned part " of the sample unless the name " and address of the consignor " appear on the container contain- " ing the article sampled, in which " case he shall forward that part " of the sample to the consignor " by registered post or otherwise, " together with a notice informing " that person that he intends to " have part of the sample analysed " by the public analyst."

Section 80, sub-s. 3: " In any " proceedings under this Act in " respect of an article sampled, the " summons shall not be made " returnable less than fourteen " days from the day on which it is " served, and a copy of any certi- " ficate of analysis obtained on " behalf of the prosecutor . . . " shall be served with the " summons."

At the hearing the prosecuting solicitor having stated that he proposed to adduce in evidence both certificates 7582 and 386, the solicitor for the respondent objected that the respondent had not been served with a copy of certificate 386 with the summons and that consequently the information was bad.

For the appellant it was contended that under s. 80, sub-s. 3, it was only necessary to serve with the summons a copy of the certificate of the analysis of the sample, the subject of the information, and that it was not necessary to serve copies of certificates of other samples which were taken to meet a certain defence.

The justices upheld the preliminary objection and dismissed the information, but stated this case.

R. C. Hutton for the appellant. " Any certificate of analysis " in s. 80, sub-s. 3, of the Act of 1938, means any certificate dealing with the analysis of the milk the subject-matter of the charge, and that only. It does not mean every certificate which might be produced in evidence at the hearing. Otherwise a prosecutor could never take a sample under s. 70, sub-s. 2, after the date of the summons, because it would not be possible to serve a copy with the summons. " Any " means " any, " if there is one." If the argument that " any " includes a certificate taken under s. 70, sub-s. 2, is right, then on the respondent's argument it would have to be served with the summons, and the provision in cl. 5 of sch. III., that a copy shall be furnished to the purveyor, is unnecessary ; and that provision does not mean that it shall be served with the summons.

Quass for the respondent. Schedule III. does not refer to

s. 80, sub-s. 3, at all, but to s. 71, sub-s. 1, and s. 84, sub-s. 2, and only to samples taken in transit or on delivery. Clause 5 of sch. III. only gives additional protection to the purveyor in certain special circumstances in the case of milk, and nothing in it should be construed as cutting down the general provisions of s. 80, sub-s. 3, which apply to all articles of food or drugs, milk or otherwise. " Any " means any certificate obtained for the purposes of the proceedings, which certificate No. 386 clearly was.

ATKINSON J. This is a case stated by justices, sitting at Faringdon, and it raises a question as to the construction of s. 80, sub-s. 3, of the Food and Drugs Act, 1938. The respondent was summoned for selling, on July 17 of last year, a pint of new milk which was not of the nature, substance and quality demanded by the appellant, the same being deficient in milk fat to the extent of five per cent., and the summons was heard on August 29.

[His Lordship stated the facts, and continued :] Prima facie, the sample under s. 70, sub-s. 2, taken on July 19, 1944, is one which does not affect the respondent, but is more concerned with the original supplier. Both samples were sent to the public analyst, and on July 25 he issued two certificates. The certificate relating to the milk in respect of which Cox was prosecuted was certificate No. 7582, and it certifies that there was only 2·85 percentage of fat. The certificate of the sample taken on July 19 was No. 386. I do not know that anything really turns upon what precisely happened at the hearing, but the solicitor for the prosecution opened the case, and stated that he proposed to adduce in evidence both the certificates. At once the respondent objected that he had not received a copy of the second certificate numbered 386, with the summons, and the justices took the view that he was entitled to, and ought to have been served with a copy of that certificate along with the summons, and on that ground dismissed the information.

The contention of the respondent is that " any " in s. 80, sub-s. 3, means " every " certificate of analysis. There the submission ends. Analysis of what, and within what limitation, I know not. The appellant says that the obvious meaning of that word is : " any certificate of analysis of the article " sampled, of that which you are speaking about, the subject- " matter of the information." And in my view the argument of the appellant is unanswerable. It seems to me that some limitation must be put upon the words "any certificate of "analysis." If it is not limited in that way, where is the line to be drawn? Is it any certificate of analysis of any milk at any time purchased, however irrelevant to the article sold and sampled? If it had been meant to go beyond the analysis relating to the article sampled, surely there would have been some words indicating the class or the limits within which the certificates to be served must come. There is one little indication of the meaning of those words which has been pointed out. I do not know that it goes to very much, but it is perhaps just worth something. Sub-section 3 of s. 80 relates to everything dealt with under the Act; but, in the case of milk, s. 71, which is headed: "Special provisions as to the sampling of "milk and proceedings subsequent thereto," provides "(1.): "The provisions of this Act relating to the procuring of samples "by sampling officers, and proceedings in connexion therewith, "shall, in relation to milk, have effect subject to the provisions "of sched. III. to this Act." Schedule III. provides, putting it shortly, that when the milk is bought and a sample is taken in the way which I have related, the purveyor has this right, that within sixty hours after the sample has been procured from him he can serve a notice on the officer (of the county council, in this case), telling him where the milk was bought, giving him the name and address of the consignor from whom he received the milk, and can call upon him to take a sample of milk from a corresponding milking in the course of transit or delivery to himself from the seller or consignor, and that then the inspector is bound to do that. When it is done, cl. 5 of this schedule provides that: "If proceedings are taken against "the purveyor, a copy of the certificate of the result of the "analysis of every sample so procured in the course of transit "or delivery shall be furnished to him, and every such "certificate"—and so on, shall be admissible at the trial.

The point that Mr. Hutton makes there is that if sub-s. 3 of s. 80 really applied to every conceivable certificate having any bearing whatever on the case, it would have been quite unnecessary to put in that provision, because obviously, on Mr. Quass's argument, that would have been a relevant certificate, which would have had to be served with the summons. But the provision there is not that it should be served with the summons, or anything of that sort, but that a copy of it shall be "furnished." That does not mean served with the summons. The view I have formed is that the appellant's contention is right, and that the only way to give "any certificate of analysis" in sub-s. 3 of s. 80 any clear meaning is to confine it to the certificate of analysis of the article concerned, which in this case was the pint of milk purchased on July 17. For these reasons, I think the appeal should succeed.

WROTTESLEY J. I agree that what is meant by the words "any certificate of analysis" is any certificate of analysis of the article sampled, and therefore to that extent of the article which is the subject of the information. Such analysis would not necessarily be confined to the sample, because, except where an article is purchased, as, for instance, a pint of milk, which was the case here, where the whole of the pint of milk becomes the sample, you may have cases where the sample is of a bulk, and in that event, it seems to me, the article sampled would not be the sample itself but would include the bulk, and therefore other analyses taken of the bulk would appear to me to fall within the words "any certificate of analysis obtained on "behalf of the prosecutor," and it would also be "of an article "sampled," referred to in sub-s. 3 of s. 80. So far as the word "any" is concerned, again, for the reasons that have been given, I think it is the appropriate word, because it does not follow that in every case of a prosecution or information the analysis would be reduced into the form of a certificate. I agree with the judgment of Atkinson J., for the reasons which he has given.

TUCKER J. I agree, although I do not think the point is perhaps quite so clear as do the other members of the court, for this reason, that, in my opinion, some words have to be read into s. 80, sub-s. 3, whatever interpretation is placed on the sub-section. I think it would suffice Mr. Quass's argument if one read in the words "any certificate of analysis obtained on "behalf of the prosecutor for the purposes of such proceedings." On the other hand, if Mr. Hutton is right, I think the words which have to be read in are "in respect of the article which is "the subject matter of the prosecution." And the question, to my mind, is which of those alternative sentences should be read in. On the whole, I have come to the conclusion that the words which should be read in are "in respect of the article "which is the subject-matter of the prosecution." When one reads the whole of s. 80, I think that is what is envisaged. Generally speaking, what is envisaged is the taking of one

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sample, no doubt for the purpose of the prosecution, although there may conceivably be cases in which two samples might be taken in respect of the article which is the subject-matter of the prosecution. If that were so, then, no doubt, service of both analyses would have to be made on the seller.

I am glad to think that this interpretation cannot possibly work any hardship on anybody, because if an analysis is taken and a certificate is obtained, it cannot be put in evidence except under the provisions of s. 81, sub-s. 1, which, so far as is material, reads as follows: "In any proceedings under this Act, the "production by one of the parties of a document purporting to "be a certificate of a public analyst in the prescribed form . . . "shall be sufficient evidence of the facts stated therein, "unless . . . . the other party requires that the analyst shall "be called as a witness." And sub-s. 3 provides, leaving out the words which are not material to this case: "If a defendant "intends . . . . under sub-s. 1 of this section, to require that "the public analyst shall be called as a witness . . . . notice of "his intention . . . . shall be given to the other party at least "three clear days before the day on which the summons is "returnable, and, if this requirement is not complied with, "the court may, if it thinks fit, adjourn the hearing on such "terms as it deems proper." It seems to me, therefore, to follow that if a prosecutor has an analysis made and obtains a certificate afterwards which he intends to use at the proceedings, he does so at his peril if he has not served a copy on the defendant in sufficient time to enable the defendant to comply with the requirements of sub-s. 3. If he does not, the court will no doubt grant an adjournment and the prosecution very likely will be penalized in costs. I agree with the judgments which have been given.

Solicitors for appellant: *Peacock & Goddard, for H. J. C. Neobard, Clerk to Berkshire County Council.*

Solicitors for respondent: *J. & P. J. F. Chapman-Walker, for Lemon, Humphreys & Parker, Swindon.*

W. L. L. B.

Discussed. ZEIDMAN *v.* OWEN [1950] **1 K. B. 593**

BRETHERTON *v.* UNITED KINGDOM TOTALISATOR COMPANY, LIMITED.

1945

June 14, 22.

Lord Goddard, Humphreys and Cassels JJ.

Gaming—Football pool advertised in newspaper—Pool conducted by bookmaker on credit system—Prize competition "for forecasts of the result "of a future event"—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 26, *sub-s.* 1.

The respondent company, whose only trade or business was that of a bookmaker, advertised in a weekly newspaper a coupon for a football pool. The coupon consisted of a form setting out a number of football matches to be played on the following week and persons desiring to take part in the pool were invited to predict the results of the matches, and to stake a named sum. When filled in, the coupon was sent to the respondent company, but investors were not required to send the amount of their stakes till the following week. From the amount of the stakes contributed to the pool the respondent company deducted ten per cent.for their commission and expenses and the balance was distributed among the investors whose forecasts proved to be correct or most nearly correct. An information was preferred against the respondent company for that they did unlawfully conduct through a newspaper a competition in which prizes were offered for forecasts of the result of future events, to wit football matches which had not then been played, contrary to s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934. The chief magistrate held that he was bound by the decision of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.*, that a similar football pool was not a competition in which prizes were offered, and dismissed the information :—

Held, that the football pool was a "competition" in which "prizes" were offered "for forecasts of the result . . . . of a "future event," within the meaning of s. 26, sub-s. 1, and that being such a competition, the respondent company were not protected by the terms of the proviso to the sub-section.

Elderton v. *United Kingdom Totalisator Co., Ld.* [1935] Ch. 373, overruled.

CASE stated by the chief magistrate of the police courts of the metropolis.

An information was preferred by the appellant, John Bretherton, against the respondent company, United Kingdom Totalisator Co., Ld., whose only trade or business was that of a bookmaker as defined in Part I. of the Betting and Lotteries Act, 1934, for that they on February 26, 1944, did unlawfully conduct through a newspaper called "The Winner" a competition in which prizes were offered for forecasts of the results of future events, to wit, football matches which had not then been played, contrary to s. 26, sub-s. 1, of the Betting and

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Lotteries Act, 1934 (1). It was proved or admitted at the hearing of the information that on February 26, 1944, the respondent company published in a newspaper called "The "Winner" a coupon for a football pool conducted weekly by them. The coupon consisted of a form setting out a number of football matches to be played in the following week, and persons desiring to take part in the pool were invited to predict the winners of the matches or whether the games would result in a draw. A number of different pools with varying stakes were included in the coupon, and a participator in the pool, who was described in the coupon as an investor, could enter for as many as he desired. When filled in, the investor sent the coupon to the respondent company, but was not required to send the amount of his stake until the following week. From the stakes contributed by the investors, the respondent company deducted an amount for commission and expenses and the balance was divided among the entrants whose predictions were most nearly correct. Each correct forecast carried so many points, and seventy per cent. of the distributable balance went to those with the highest points, twenty per cent. to those who came next in the number of points gained, and ten per cent. to the next in order. Thus, if one investor obtained more points than any other, he would take the whole of the seventy per cent. If several obtained the same number, the seventy per cent. would be divided between them, and the same system applied to the twenty per cent. and the ten per cent.

On the above facts the chief magistrate held that the case was not materially distinguishable from *Elderton* v. *United Kingdom Totalisator Co., Ld.* (2) in which Eve J. held that the pool conducted by the present respondent company, which was then in question, was not "a competition in which prizes "are offered for forecasts of the result . . . . of a future "event" within the prohibition of s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934, but a pari-mutuel or pool betting

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(1) Betting and Lotteries Act, 1934 (24 & 25 Geo. 5, c. 58), s. 26, sub-s. 1: "It shall be "unlawful to conduct in or "through any newspaper, or in "connexion with any trade or "business or the sale of any "article to the public—(*a*) any "competition in which prizes are "offered for forecasts of the "result of a future event . . . . "Provided that nothing in this "sub-section with respect to the "conducting of competitions in "connexion with a trade or "business shall apply in relation to "pari-mutuel or pool betting "operations carried on by a person "whose only trade or business is "that of a bookmaker as defined "in Part I. of this Act."

(2) [1935] Ch. 373.

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operation conducted by a bookmaker and therefore lawful under the Act. He accordingly dismissed the charge. The appellant appealed.

Valentine Holmes for the appellant. The decision of Eve J. in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1), on which the chief magistrate relied, cannot be supported. The ratio decidendi there was that the football pool was not a "competition" and that there were no prizes, with the result that s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934, did not apply. Eve J. arrived at that decision by entirely disregarding the proviso to the sub-section, which is of vital importance. The effect of it is that a bookmaker, notwithstanding the earlier provisions of the section, is entitled to carry on pari-mutuel or pool betting, but if the operation is one of the kind referred to in (*a*) or (*b*) of the sub-section, he may not carry it on through a newspaper. It is clear from the terms of the proviso that the legislature contemplated the possibility of a pari-mutuel or pool betting being a "competition" of the nature specified in s. 26, sub-s. 1. The present pool is a "competition" in which prizes are offered for forecasts of future events, and is consequently unlawful if conducted through a newspaper and the proviso does not protect the respondent company. It is quite clear that there was a "competition" here. Every subscriber to a pool is competing with all the other subscribers, and his success does not depend entirely on the success of his own forecasts but also on the success or otherwise of other investors. All the investors are competing for the pool which constitutes "the prize," and it makes no difference that the prize is subscribed for by all the investors and it is not provided by those who are conducting the pool. The question in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (2), on which Eve J. relied in the case under review, was whether a company owning a club which provided facilities for its members to make bets on a totalisator was a principal in the bets made by each member, and it was held that the bets were made by the members inter se. That case has no bearing on the question now raised. (He also referred to *Kelly* v. *Murphy* (3).).

Beyfus K.C. and *T. Elder Jones* for the respondent company. The decision in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1) was right and should be followed. Part I. of the Betting and Lotteries Act, 1934, makes elaborate provisions for such

(1) [1935] Ch. 373.
(2) [1929] A. C. 400.
(3) 1940 S. C. 96.

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restrictions as the legislature desired to impose on pari-mutuel or pool betting. Part II. is headed "Lotteries and Prize "Competitions," and, on the face of it, is dealing with a different matter from that dealt with in Part I. It is noticeable, e.g., that the reward received by a successful competitor in an operation regulated by Part II. is described as a "prize." The expression "competition in which prizes are offered" is wholly inapt to describe pool betting in which there are no prizes and no offer of them. Schedule I. to the Act contains provisions regulating the establishment and operation of totalisators, and the whole of the language there used is consistent only with the idea of betting as opposed to that of the offer of prizes for success in a competition. For example, the winners of the operations referred to in the schedule are described as persons "winning bets," and winnings are described as the "amount payable in respect of each betting "unit staked." The terms on which the totalisator is operated are described as "the terms on which the operator invites "persons to bet by means of the totalisator," and the whole of this phraseology is entirely inconsistent with the idea of a pari-mutuel or pool betting coming within the words "a "competition in which prizes are offered." It is wholly wrong to suggest that the proviso to s. 26, sub-s. 1, only makes sense if a "competition in which prizes are offered" includes pool betting. The object of this part of the section is to prevent an ordinary legitimate trade or business from being boosted in an illegitimate fashion by offering the attraction of prize competitions, and the proviso merely prevents the application of that prohibition to the boosting of pari-mutuel or pool betting by such means. The objections on the ground of public policy to the publication of such a competition which apply in the case of a competition intended to boost an ordinary business do not apply in the case of pari-mutuel or pool betting. There is nothing more dangerous than to attempt to modify the words of an enacting section by the terms of a proviso. It would be particularly dangerous in a case like the present where the enacting part of the section is quite clear and unambiguous, whereas, on any view, the proviso is obscurely worded: per Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society* (1); per Lord Halsbury L.C. in *McLaughlin* v. *Westgarth* (2).

Cur. adv. vult.

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(1) [1897] A. C. 647, 653.

(2) (1906) 75 L. J. (P. C.) 117, 118.

1945

BRETHERTON v. UNITED KINGDOM TOTALISATOR CO., LD.

June 22. The judgment of the court was read by LORD GODDARD. This is an appeal by way of special case stated by the chief magistrate of the police courts of the metropolis, who dismissed an information preferred by the appellant against the respondent company for that on February 26, 1944, it did unlawfully conduct through a newspaper called " The Winner " a competition in which prizes were offered for forecasts of the results of future events, to wit, football matches which had not then been played, contrary to s. 26, sub-s. 1, of the Betting and Lotteries Act, 1934. The learned chief magistrate held that the facts proved before him were indistinguishable from those in *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1), and on that point we agree with him. In that case Eve J. held that the facts did not disclose a breach of the section in question ; and accordingly the magistrate dismissed the information, being of opinion that the decision was binding on him. This appeal is brought to test the correctness of that decision.

[His Lordship then briefly stated the facts of the present case, read s. 26, sub-s. 1 (*a*), and the proviso, and continued :] The section, therefore, renders three things unlawful : (1.) conducting a particular class of competition through a newspaper ; (2.) conducting it in connexion with a trade or business ; (3.) conducting it in connexion with the sale of an article to the public. If, then, this football pool is a competition in which prizes are offered for forecasts of the results of future events, the proviso will not avail the respondent company, because it was conducted through a newspaper. It is contended for the respondent company that this scheme is not a prize competition within the section, but simply pool betting, which is not prohibited by the statute, and in truth the only questions for decision are whether the scheme is a competition and whether prizes are offered for forecasts of future events.

In *Elderton* v. *United Kingdom Totalisator Co., Ld.* (1), Eve J. held that it was not a competition, but a betting transaction, and so was not prohibited by the Act. He said: " One does not compete with a man with whom a bet is made, " nor does the winner regard the money paid by the loser as a " prize." While that may be true with regard to an ordinary bet we are unable to agree with the learned judge that this scheme is not a competition. With all respect, it seems to us that the entrants are obviously competing against each other for the pool, which all hope to win in whole or in part. If half a dozen people enter for a race, each paying one shilling, the winner to take three-quarters of the pool and the second one-quarter and in the event of a dead heat the pool to be divided, they are all competing one against the other and, if the unlikely result happened that all ran a dead heat, so that they would all only get their stake back, they would none the less be competitors.

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(1) [1935] Ch. 373, 381.

Then it is said that the word "prize" is not applicable to the division of a pool, as is provided by this scheme. In our opinion, the word is used in the Act to indicate the reward to be given to successful competitors, whether in money or in kind, and it matters not that the reward is provided not by the promoters, but out of the fund subscribed by the participators. The scheme has some of the features of a sweepstake, in connexion with which the word "prize" is always used to describe that which the winner will receive. Eve J. founded his judgment largely on the decision of the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ld.* (1), but, again with all respect, we are unable to agree that that case is in any way decisive of the present. The only question before the House was whether a company which owned and carried on a club and there maintained and operated a totalisator machine for the use of members who desired to back horses was "a bookmaker with whom bets were made" within s. 15 of the Finance Act, 1926, and so liable to pay betting duty. The company merely took a percentage of all stakes in consideration of the facilities that they provided, and the expenses of management, and nothing else. It was in no way interested in the result of the races in respect of which the stakes were laid. It was held that, though the company was a bookmaker within the section, it was not one with whom bets were made and accordingly they were not liable to pay duty. That was the whole decision. Lord Buckmaster, with whom Lord Sumner agreed, thought that by means of the machine the members betted with one another. Lord Dunedin merely stated that there was no bet with the company. Lord Blanesburgh was doubtful whether the operation amounted to making bets at all, regarding it as more in the nature of a sweepstake. But, in holding that there was no betting with the company, the House in no way held that the members were not competing among themselves for the pool which was created by means of the machine, as, in our opinion, they clearly were.

It remains to say a word with regard to the proviso to the section. We have already said that it can afford no defence to the present charge, as it has no application when the competition is conducted through a newspaper, but it was argued for the appellant that the proviso showed that Parliament recognized that these pool operations were prize competitions, as otherwise there would have been no necessity for the saving which it effected. On the other hand, the respondents contended that the real object was to allow a bookmaker to carry on another gambling transaction in connexion with his betting business. So to hold would be contrary to a well settled rule of construction. A proviso is not to be construed as an enacting provision enabling something to be done which is not to be found in the statute itself: see per Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society* (1). It may be used as a guide between two possible constructions of the words to be found in the statute, or it may be inserted, as is sometimes the case, ex abundanti cautela, to prevent a possible construction which was not intended being placed upon other provisions. The statute in question here is not an Act to legalize pool betting. That form of betting was and is legal, so long as it is carried on in a manner which does not infringe the provisions of the Gaming Acts. One of the objects of the Act was to regulate it on racecourses. It is much the more probable explanation that the proviso was intended to ensure that s. 26 was not to be construed as prohibiting that which the former part of the Act merely regulated but did not forbid. In any case, as we have said, it has no application to the facts of the present case. The result is that the appeal is allowed and the case must be remitted to the chief magistrate with a direction to find the offence proved.

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(1) [1929] A. C. 400.

Appeal allowed.

Solicitors for appellant: *Pritchard, Englefield & Co.*

Solicitors for respondents: *Jaques & Co., for North, Kirk & Co., Liverpool.*

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(1) [1897] A. C. 647, 655, 656.

P. B. D.

C. A.

1945

July 12.

Scott, MacKinnon and Lawrence L.JJ.

EPPS *v.* ROTHNIE.

Landlord and tenant—Rent restriction—Unoccupied house purchased after prescribed statutory date—Subsequent agreement by purchaser to let—Expiration of tenancy—Claim for possession—" Landlord " who has become landlord by purchasing the dwelling-house "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24, Geo. 5, c. 32), sch. I. (h).

The purchaser of an unoccupied house after the statutory date specified in para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, who subsequently lets it to a tenant, is not " a landlord who has become landlord by purchasing " the dwelling-house " within the meaning of the paragraph, and is, therefore, not excepted from its provisions, which enable a landlord to recover possession of a dwelling-house if he reasonably requires it for his own use.

APPEAL from Bromley county court.

At a date subsequent to December 6, 1937 (the statutory date specified by the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I. (*h*) (1), the plaintiff, Thomas Epps, purchased a house known as 72 Hayes Lane, Beckenham, which until that time had not been occupied. By an agreement in writing he let the house to the defendant, D. A. Rothnie, for the period of one year from April 4, 1942. The agreement was made in the name of Henry West Epps, the plaintiff's brother, who was described in the agreement as the landlord. After the expiration of the year's tenancy for which the agreement provided, the defendant remained in possession of the house and continued to pay the rent to the plaintiff's agent. Early in 1945 the plaintiff was desirous of living in the house himself, and, being unable to induce the defendant to vacate it, on May 4, 1945, he took proceedings in the county court under s. 3 and para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, to recover possession. By his defence the defendant alleged that the plaintiff's brother, H. W. Epps, and not the plaintiff, was the landlord of the house. In the alternative it was contended on his behalf, that if the plaintiff was the landlord, he was "a landlord who has become landlord by purchasing the "dwelling-house" after the statutory date and, consequently, by the terms of sch. I., para. (*h*), was excepted from the provisions of the paragraph, which enables a landlord to recover possession if he reasonably requires the house for his own use.

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. 1: " A court shall, " for the purposes of s. 3 of this " Act, have power to make or give " an order or judgment for the " recovery of possession of any " dwelling-house to which the " principal Acts apply or for the " ejectment of a tenant therefrom " without proof of suitable alternative accommodation (where the " court considers it reasonable so " to do) if— . . . . (*h*) the dwelling-" house is reasonably required by " the landlord (not being a land-" lord who has become landlord " by purchasing the dwelling-" house or any interest therein " after December 6, 1937) for " occupation as a residence for " (*i*) himself; . . . . Provided that " an order or judgment shall not " be made or given on any ground " specified in paragraph (*h*) of the " foregoing provisions of this " schedule if the court is satisfied " that having regard to all the " circumstances of the case, including the question whether " other accommodation is available for the landlord or the " tenant, greater hardship would " be caused by granting the order " or judgment than by refusing " to grant it."

The county court judge admitted oral evidence to the effect that the plaintiff's brother had acted only as agent in letting the house, and that the plaintiff was the landlord. On this basis he held that although the plaintiff became the "owner" of the house when he purchased it in an unoccupied state, he did not become a "landlord" until he let it to the defendant, and consequently did not come within the exception created by para. (*h*) as being "a landlord who has become a landlord "by purchasing the dwelling-house." He found on the facts that the plaintiff reasonably required possession of the house for his own use and that greater hardship would be caused if he refused to make the order than if he granted it. He accordingly gave judgment for the plaintiff. The defendant appealed.

O'Malley for the defendant. The decision of the county court judge was wrong and the plaintiff was not entitled to claim possession. He was suing for possession under the agreement of tenancy, but that agreement was expressed to have been made between the defendant and the plaintiff's brother, H. W. Epps, who was described therein as the landlord, and the county court judge was wrong in admitting oral evidence to prove that the agreement was made on the plaintiff's behalf, and that he was, in fact, the landlord. In *Humble* v. *Hunter* (1) it was held that where a charterparty had been executed by a person, other than the plaintiff, which person described himself as " the owner of the ship," evidence was not admissible to show that such person had contracted merely as the plaintiff's agent. In *Formby Brothers* v. *Formby* (1) it was held that the decision in *Humble* v. *Hunter* (2) was still good law.

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(1) (1848) 12 Q. B. 310.

Assuming that the evidence was admissible, the county court judge was wrong in holding that the plaintiff was entitled to claim possession, as he was clearly a landlord who became landlord by purchasing the dwelling-house within the meaning of para. (*h*) of sch. I. to the Act of 1933. In *Lloyd* v. *Cook* (3), which was decided on s. 2, sub-s. 1, of the Rent and Mortgage Interest Restrictions Act, 1933, the Court of Appeal held that " landlord " was used in the loose sense of " owner " and it is submitted that in the Act of 1933 it should be construed as a person who can let, which was the position of the plaintiff in the present case when the agreement with the defendant was made. It is, in any event, quite clear that the Act of 1933 was not intended to assist a person who purchased a house after the statutory date.

Oppenheimer for the plaintiff was not called upon.

SCOTT L.J. stated the facts, and continued: The only real point taken by the appellant in this appeal is that by reason of the exception in para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the plaintiff is not entitled to possession. It was argued on behalf of the defendant that the plaintiff was not a landlord within the meaning of the enacting words of that paragraph, but that he was a landlord who was excepted from its provisions by reason of the words " not being a landlord who has become landlord " by purchasing the dwelling-house " after the statutory date specified. The county court judge, who dealt with that contention very clearly, said: " In point of fact the plaintiff " purchased the property after that " [the statutory] " date " and became the owner. But the property was then empty. " In my judgment, he did not become ' landlord ' by purchasing " it, but by virtue of a subsequent act, namely, by his letting " it for the first time to a tenant. A man is only a landlord " where there is also a tenant." Accordingly, the county court judge held, and in my view held rightly, that the plaintiff did not become landlord by purchasing the dwelling-house. He

(1) (1910) 102 L. T. 116.
(2) 12 Q. B. 310.
(3) [1929] 1 K. B. 103.

took the view, with which I agree, that the object of the exception in para. (*h*) is to protect a sitting tenant from having his house bought over his head, and that it has no application to a case where the owner of a house purchases it after the statutory date at a time when the house is actually empty, and thereafter lets it to a tenant. In my opinion the county court judge's decision was right on this point.

Another point was taken on behalf of the appellant which arises in the following way: In the original tenancy agreement, which expired on April 3, 1943, the landlord is expressed to be, not Thomas Epps, the plaintiff in the proceedings in the court below, but his brother, Henry West Epps, who was acting for him in the matter of the tenancy. It was submitted on behalf of the tenant that because the brother, who became nominally a party to the tenancy agreement, was therein called the landlord, the plaintiff was not the landlord within the meaning of para. (*h*) of sch. I. to the Act of 1933. The first answer to that contention is that the plaintiff is not relying on that agreement. After it had expired, the rent of the house continued to be paid to agents on his behalf, and was received by him, and, apart from the agreement, the relation of landlord and tenant was quite clearly established between the parties long before the proceedings were taken in the county court. The second answer to the contention is that the agreement was an ordinary agreement in writing and even if the plaintiff was compelled to rely on it, evidence would have been admissible on ordinary principles applicable to any contract in writing, to prove that the person signing it as a contracting party, was acting for an undisclosed principal. Two old cases were cited to us in which the view was taken that the particular contract under consideration was expressed in such terms as to prevent the application of the ordinary principles of agency with regard to an undisclosed principal, with the result that the parties were tied down to an agreement between the persons signing the document and no one else. Those cases were *Humble* v. *Hunter* (1) and *Formby Brothers* v. *Formby* (2). Both these cases have been discussed on many occasions and I venture to express the opinion that they can no longer be regarded as good law, a view which is, I think, justified by the observations made on them by Lord Sumner in *Fred Drughorn, Ld.* v. *Rederiaktiebolaget Trans-Atlantic* (3). I think the appeal fails on both the points argued before us, and must be dismissed.

(1) 12 Q. B. 310.
(2) 102 L. T. 116.
(3) [1919] A. C. 203.

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MacKinnon L.J. I agree. I think that the county court judge was quite right in the construction he placed on para. (*h*) of sch. I. to the Act of 1933. If the construction for which Mr. O'Malley contends is correct, it is inconceivable that the legislature would have wasted ink and paper by inserting the unnecessary words "who has become landlord by purchasing "the dwelling-house" since it would have been sufficient simply to have said "not being a landlord who has purchased "a dwelling-house." Mr. O'Malley discussed some cases which dealt with the meaning of the word "landlord" in s. 2, sub-s. 1, of the Rent and Mortgage Interest (Restrictions) Act, 1923. The words in that sub-section are "Where the "landlord of a dwelling-house . . . . is in possession of the "whole of the dwelling-house at the passing of this Act . . . ." Manifestly, a landlord who had a tenant could not be in possession of the house and that mere fact shows that the word "landlord" in that sub-section does not mean one of the two parties to a contract of tenancy—that would be ridiculous—but the owner of a house who is in a position to become a party to such a contract. The considerations applicable to the meaning of the word landlord in that sub-section are obviously entirely different from those which govern the meaning of the simple words "a landlord who has become landlord by purchasing the dwelling-house," which we have to construe. I agree that this appeal should be dismissed.

Lawrence L.J. I also agree. I will only add that if the plaintiff in the present case were suing on the written agreement, it might be necessary for us to consider the decision in *Danziger* v. *Thompson* (1), in which it was held that oral evidence was admissible to show that a person described as the "tenant" in a tenancy agreement entered into the agreement as the agent of another person. The plaintiff in the present case, however, is not suing on the agreement. It may also be observed that the only words in the agreement which could be contradicted by proof of agency are the words "hereinafter called the landlord," which are not necessarily inconsistent with the fact of the person so called being the agent for an undisclosed principal.

Appeal dismissed.

Solicitors for defendant: *Neil Maclean & Co.*
Solicitor for plaintiff: *W. J. Stoffel.*

(1) [1944] K. B. 654.

P. B. D.

ATHEL LINE, LIMITED *v.* LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCIATION, LIMITED.

1945
May 7, 8, 17.
Atkinson J.

Insurance (Marine)—War risk—Warlike operation—Requisitioned vessel —Anchorage in unusual naval base to discharge cargo—Stranding at night on hidden and uncharted rock—Insurers' liability.

The motor tanker A. was requisitioned during the war by the British government and, laden with fuel oil, was on a voyage from Trinidad to Lochalsh and Scapa Flow under a government form of charter. On arrival in Scottish waters on November 26, 1942, the vessel was directed by the naval authorities to an anchorage in Lochalsh harbour, a temporary war naval base, there to discharge a part of her cargo into a naval vessel. While swinging and ranging to her anchor during the night before proceeding alongside the receiving vessel, she stranded on an invisible and unknown rock and sustained damage to her hull. There was no question of negligence in her management or navigation. The claim of the owners to be indemnified under the terms of a war risk policy, which (inter alia) insured the vessel against damage suffered during any warlike operation, was resisted by the insurers on the ground that the war risk had ceased when the vessel came to an anchor in Lochalsh harbour :—

Held (affirming the award of an arbitrator), that the vessel was, at the time of the damage, on the same footing as a warship in the course of carrying out a warlike operation which had not been oompleted, and that the stranding was traceable to definite action by those on board in directing the management of the vessel during the continuance of that operation in waters where there were hidden and unknown rocks. The war risk continued after the vessel anchored, and the insurers were liable under the war risk policy.

CASE stated by an arbitrator.

The claimants, Athel Line, Ld., claimed to be indemnified by the respondents, London & Liverpool War Risks Insurance Association, Ld., under a marine time policy of war risk insurance dated April 24, 1940, for damage sustained by the motor tank vessel *Atheltemplar* on November 27, 1940, in the naval harbour of Lochalsh, situated between the Isle of Skye and the mainland of Scotland. The vessel at the material time was under requisition by the Ministry of War Transport and had left Trinidad, West Indies, on October 19, 1940, on a voyage towards Lochalsh and Scapa Flow for the purpose of there discharging and delivering her cargo of fuel oil in accordance with the orders of the government time charterers. Lochalsh was at that date under the control of a King's harbour master, and was being used solely for naval purposes.

The material clause of the war risk policy was as follows :—" This insurance is only to cover the risks (in this policy referred " to as 'King's Enemy Risks') of capture, seizure, arrest, " restraint, or detainment by the King's enemies and the " consequences thereof, or of any attempt thereat ; also of the " consequences of hostilities or warlike operations by or " against the King's enemies whether there be a declaration " of war or not ; but excepting civil war, revolution, rebellion, " insurrection and civil strife arising therefrom, and piracy."

The following facts were agreed between the parties : While at anchor in the conditions which prevailed the *Atheltemplar* was subject to constant movement in the water, in addition to her sheering and swinging to the tide when it commenced to flow on November 26, and to ebb on November 27. Active watches were kept on the vessel while at anchor, observation was kept of her position and throughout the night the anchor cable was watched and tended by those in charge of and under the direction of those on board. At daylight on November 27 it was discovered by soundings that the vessel had grounded and was fast on a rock under number 8 tank, slightly on the starboard side. She floated off on the rising tide, and proceeded, at the direction of the King's harbour master, with the assistance of naval tugs, alongside the naval depot vessel, into which she discharged about 7,150 tons of oil. The naval authorities then ordered the *Atheltemplar* to proceed to Scapa Flow to discharge the remainder (about 5,350 tons) of her cargo there. She completed discharge on December 12, 1940. By reason of the grounding at Lochalsh the *Atheltemplar* sustained considerable damage to her hull and bottom, the extent of which was not known until survey in dry dock at North Shields, and the damage and cause thereof were then reported to the King's harbour master at Lochalsh.

Before the arbitrator, Mr. F. A. Sellers, K.C., it was contended by the claimants that the *Atheltemplar*, at the time of the grounding, was engaged in a warlike operation, and the damage was a consequence of such warlike operation. It was contended on behalf of the insurers that the vessel was not, at any time in the course of the voyage from Trinidad to Lochalsh, on a warlike operation, but that if she were so engaged the warlike operation ceased when she dropped anchor at Lochalsh, and the damage sustained by the stranding was not the consequence of any warlike operation on which the vessel was then engaged.

The arbitrator held that at all material times the *Atheltemplar* was on a warlike operation, that the damage caused to her by the grounding was a consequence of warlike operations, and that the claimants were entitled to be indemnified by the respondents. The respondents appealed.

Sir Robert Aske K.C. and *Devlin* for the insurers: At the time of the casualty the *Atheltemplar* was not engaged on a warlike operation. She was at anchor and at rest. The word "operation" describes an act performed voluntarily, that is, by the exercise of the will on a thing—in this case the direction of the movement of the *Atheltemplar* by those on board her: See Oxford English Dictionary, sub "Operation," para. 7 :—" Mil. and naval. A series of warlike or strategic "acts; a movement." Before this tribunal it is admitted that the *Atheltemplar* was engaged in a warlike operation up to the time when she dropped anchor at Lochalsh. From that time on she was not performing any operation. As Lord Wright said in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (1) :—" The basis of the decisions "seems to be that the casualty can be traced to definite "action on the part of those on board the warship or quasi-"warship . . . . in directing the course of the vessel to "carry out the warlike operation." Here there was no definite action and no direction of the course of the vessel on the part of those on board the *Atheltemplar*. Lord Porter said in the same case (2) :—" . . . . but, though a casualty "may in such circumstances happen to or by the action of "a ship engaged in a warlike operation, it may, I think, not "be due to the progress of the ship through the water, but "to some other cause as, e.g., in the case of the *Clan* "*Matheson* (3) where as it was said the collision with the "*Pelingaudet* was only incidental and the ship owing to her "own misfortune, was already a lost ship before the collision "took place. It may be that if a vessel, even when engaged "on the warlike operation of proceeding from one war base "to another, suffers damage by a definite external event, "unexpected and unavoidable, in which the damaged vessel "was not an active participant but a quiescent sufferer, the

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(1) [1942] A. C. 691, 713.
(2) Ibid. 719.
(3) [1929] A. C. 514.

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"loss should be attributed to that event and not to the passage "of the ship through the water." The thread which runs through all the speeches of the Law Lords in the *Yorkshire Dale* case (1) is that, for a vessel to be engaged in a warlike operation, she must be directed by those on board in the proceeding of the vessel through the water. In *Larrinaga Steamship Co., Ld.* v. *The King* (2) Lord Porter said (3): "There "is abundance of authority in your Lordships' House that "a ship engaged in carrying war stores from one war base "to another, or indeed in carrying war stores to a war base, "is engaged on the warlike operation of proceeding through "water to her appointed discharging port." The authorities do not support the proposition that the *Atheltemplar* when at anchor at Lochalsh was engaged on a warlike operation, although she may have been during the time when she was being directed through the water. Stranding is prima facie a marine peril, and the stranding of the *Atheltemplar* was not the consequence of any warlike operation on which that vessel had been or was engaged.

A. J. Hodgson for the claimants: The arbitrator found that the *Atheltemplar* was, at all material times, engaged on a warlike operation and that the damage which she suffered by grounding was the consequences of a warlike operation. These were essentially questions of fact. See *Board of Trade* v. *Hain Steamship Co., Ld.* (4), also the speech of Lord Dunedin in *Leyland Shipping Co., Ld.* v. *Norwich Union Fire Insurance Society, Ld.* (5). For the insurers it has been contended that not only was the vessel at the time of the casualty not engaged on a warlike operation, but she was not engaged on any operation, since to constitute an operation there must be movement and action, and action on the part of the thing operated—in this case the *Atheltemplar*. But if the voyage constituted the warlike operation, the vessel had not completed her voyage, and did not do so until she had discharged the second part of her cargo at Scapa Flow. The warlike operation was the transit of this cargo from Trinidad until its final delivery at Scapa Flow. There can be no interruption in the course of the warlike operation. All the dicta cited from *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (6), which speak of the course of the vessel as of the

(1) [1942] A. C. 691, 713.
(2) [1945] A. C. 246.
(3) Ibid. 257.
(4) [1929] A. C. 534.
(5) [1918] A. C. 350, 362.
(6) [1942] A. C. 691.

vessel proceeding through the water, are describing part of the warlike operation, not its totality.

[ATKINSON J. Is it clear that a mercantile vessel carrying oil for the Navy to naval bases is engaged on a warlike operation ?] Yes. Prima facie the transport by sea of war material in time of war from one war base to another war base is a warlike operation. (See *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (1).) The dominant features of the ship and the dominant object of the voyage must be considered. (*Harrisons, Ld.* v. *Shipping Controller* (2).) See also the observations of Lord Atkinson in *Britain Steamship Co., Ld.* v. *The King* and the two other cases reported with it (3). There was no question but that the steamship *Ramon de Larrinaga* on her journey to France was engaged on a warlike operation (*Larrinaga Steamship Co., Ld.* v. *The King*) (4). See also the judgment of Rowlatt J. in *Atlantic Transport Co., Ld.* v. *The King* (5). But it is not enough to say that this vessel was engaged in a warlike operation at the time of the casualty. The loss must be proximately caused by the warlike operation. (See the speeches of Viscount Simon L.C. and of Lord Porter in the *Yorkshire Dale* case (6).) The arbitrator has found that it was so caused and that there was no break in the chain of causation. See the observation of Viscount Finlay in *Attorney-General* v. *Ard Coasters, Ld.* (7).

Sir Robert Aske K.C. replied.

Cur. adv. vult.

ATKINSON J., after stating the facts, continued: If this venture were not a warlike operation the loss might not be deemed to have been a consequence of the making of the voyage. Such a loss might be said to be merely a fortuitous result of the ships being at a particular place at a particular time. But even if that would have been the true view as to an ordinary voyage, it does not follow that that view ought to prevail, or does prevail with regard to a warlike operation. The latest case to emphasize the distinction between the ordinary commercial voyage and a warlike operation is *Larrinaga Steamship Co., Ld.* v. *The King* (4). The *Larrinaga*, a requisitioned ship, was ordered to take war stores to a base

(1) [1923] A. C. 191.
(2) [1921] 1 K. B. 122.
(3) [1921] 1 A. C. 99, 119.
(4) [1945] A. C. 246.
(5) (1921) 9 Ll. L. Rep. 371.
(6) [1942] A. C. 698, 716.
(7) [1921] 2 A. C. 141.

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at St. Nazaire during the war. She arrived safely and discharged her cargo, and was then ordered to Cardiff for a joint survey with the idea of being released from further service. The charterparty provided that the master should be under the orders and directions of the charterers as regards employment, and that "The charterers hereby agree to "indemnify the owners from all consequences that may arise "from the master complying with such orders." In addition to being ordered to Cardiff the ship was ordered to leave St. Nazaire the moment her cargo was discharged. It was dark, raining, blustery and the channel was unlighted. The acting master protested, but he was ordered to leave, and in navigating the channel the ship stranded and bumped along the sandbanks. She finally had to return to St. Nazaire in a much damaged condition. The owners sought to make the charterers liable for that loss. It was argued that the ship was still engaged on a warlike operation, in which case liability was admitted, but if not so engaged, that the stranding arose from complying with the order to sail to Cardiff or at any rate from complying with the order to sail under dangerous conditions. It was held that the warlike operation was over, that the stranding was not a result of the order to sail to Cardiff and that the instructions to leave were not instructions relating to employment, but were navigational instructions, and that, therefore, even if the stranding could be considered the result of those orders, they were not orders regarding employment. Viscount Simon L.C. thought that, even if they had been, the stranding was too far removed to be the consequence of them. Lord Porter said (1): "A loss is not, under English "law, caused by orders to make or by making a voyage because "it occurs in the course of it. Such a loss is merely the "fortuitous result of the ship being at a particular place at "a particular time, and in no legal sense caused by the "charterers' choice of port to which the ship is directed, or "their instructions to her master to proceed to it." It is clear therefore that cases concerning damage from sea peril while the ship is engaged on a warlike operation are on a different footing from cases where ships are not so engaged, although the peril and damage are precisely the same.

The question in the present case is: "How far does the "difference extend?" Sir Robert Aske contends that

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(1) [1945] A. C. 260.

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a careful examination of *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (1), which is by far the most illuminating authority on this point, shows that it is only when the ship is actually proceeding through the water in performance of her warlike operation that collisions and strandings are deemed to be the consequence of the warlike operation. It is said that in the present case the ship was anchored from 6.30 p.m. until a few minutes before 8.45 the following morning, when she was found to have stranded, and he argues that because for fourteen hours she had been lying there doing nothing, it is quite impossible to say that the warlike operation was proceeding at that moment, and the case ought to be treated as if the ship had not been engaged on a warlike operation but merely subject to a marine peril which had nothing to do with a warlike operation.

To decide this question it is necessary to ascertain, if one can, from the decision in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (1), how the exceptional rule relating to warlike operations came into existence and what is the basis of it. The most instructive opinion is that of Lord Wright, who dealt with the history of the rule and showed how it came about. He said: (2) " The stranding in this " case was undoubtedly a peril of the seas, but we must look " behind the stranding to ascertain if the cause of the casualty " was a peril which could be described as a consequence of " warlike operations. It is necessary to examine more closely " what these words cover in principle and on the authorities, " at least so far as relevant for the matters in hand, in their " application to the circumstances of a merchant, not a naval, " vessel." Again he said (3): " The next development " came through treating a merchant vessel as being on the same " footing as a war vessel simply because of the cargo she was " carrying and the character of the place of departure or " destination. Once it was determined that she was to be " treated as on this footing it did not matter (so it was held) " that the sea peril, collision, or the like, was, apart from the " special character attributed to her, merely an ordinary " marine casualty, the occurrence of which was in no way " influenced by the nature of her cargo, or, indeed, her ports of " sailing or destination, except in the sense that she was being " navigated on the particular voyage." There again are the

(1) [1942] A. C. 691.
(2) Ibid. 707.
(3) Ibid. 710.

words " on the same footing as a war vessel." Lord Wright continued (1): " I have gone through these authorities to " show why, in my opinion, it is fallacious to require a connexion between the casualty—stranding, collision, or the " like—and the nature of the cargo being carried or the termini " of the voyage. The nature of the cargo is, indeed, material " at an earlier stage . . . ." Further on he said (2): " The " parallel between the warship and the merchant ship has " up to now been limited to cases of collision, or cases resembling " collision, such as stranding. I do not see why the principle " should be extended any further or beyond the point to " which the cases have carried it." That case was one of stranding. Lord Porter, in the same case, pointed out that Lord Cave L.C., in *The Petersham and The Matiana* (3) quoted with approval the statement that almost any movement of a warship of a belligerent power by sea in time of war is a warlike operation, and said (4): " The logical conclusion of " these observations would seem to be that, in a case where " the warlike operation consists in passing from one war base " to another, any accident due to proceeding between the " starting and finishing points is caused by the warlike " operation . . . ." And further on: " Proof, then, is " required that the damage claimed for was caused by the " warlike operation. Stranding, it is true, is normally a marine " risk just as a collision is, but it may, nevertheless, be effectively caused by a warlike operation where that operation " is the proceeding from one war base to another and the " stranding takes place as a result of so proceeding." He then said: " I should be prepared to hold that almost any " casualty befalling a vessel as a result of her own action in " proceeding on a voyage, in a case where proceeding on that " voyage was a warlike operation, was caused by a warlike " operation," and then, almost the last words (5) " . . . . in " the circumstances the cause of the *Coxwold* being at that " place at that time in those conditions was her warlike " operation, and the loss was, in my view, not only in the " course of but caused by that operation."

When that case was before the Court of Appeal, MacKinnon L.J. objected to regarding stranding as the result of the warlike operation, in effect saying: " Where are you

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(1) [1942] A. C. 712.
(2) Ibid. 713.
(3) [1921] 1 A. C. 99, 109, 110.
(4) [1942] A. C. 717.
(5) Ibid. 720.

"going to draw the line; is everything that happens the "result of warlike operation?" Lord Wright dealt with that by stating: (1) "There are, however, I think, obviously "some damage claims in the case of a requisitioned ship while "engaged on a warlike operation which do not come within "the war risk provision. Thus, a fire accidentally caused on "board, or accidents within the Inchmaree clause, or leaks "due to inherent defects in the hull, would not seem to me, "as at present advised, to come within the war risk cover in "any event. The basis of the decisions seems to be that the "casualty can be traced to definite action on the part of those "on board the warship or quasi-warship (if I may use that "term) in directing the course of the vessel to carry out the "warlike operation."

It is clear that in the present case the warlike operation had not been completed when the accident happened. If the basis of the special rule as to causation applicable to merchant ships engaged on warlike operations is that, while so engaged, they are on the same footing as a war vessel, and that it does not matter that the sea peril was an ordinary marine casualty, I cannot see how it can reasonably be said that this stranding was not a consequence of the warlike operation. Could it be said, if this ship had been a war vessel, that she was not engaged on a warlike operation? I do not think so. If, while just about to drop her anchor, she had hit a rock, there could be no question about it. Here she was directed to an anchorage so near to a latent danger that a change in the wind and a shortening of her cable caused her disaster, and caused the disaster at a time when her task had not yet been completed. That task was to discharge part of the oil carried into a naval vessel at Lochalsh, and then to go to Scapa Flow, where the rest of the oil was to be discharged. In my view, if she had been a war vessel doing precisely the same thing it would have been impossible to say that she was not engaged on a warlike operation, and, if this vessel is to be treated on the same footing as a warlike vessel, the same result must follow.

I want to test that conclusion by reference to one or two principles enunciated by Lord Wright in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* (2). He said (3): "The warlike operation is, as it were, an umbrella which "covers every active step taken to carry it out, including the "navigation, the course and helm action intended to bring the

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(1) [1942] A. C. 704.

(2) Ibid. 691.

(3) Ibid. 704.

"vessel to the position required by the warlike operation." And further on (1): "The basis of the decisions seems to be "that the casualty can be traced to definite action on the "part of those on board . . . ."

What happened here? There was the anchoring, which was an active step in pursuance of naval orders, at a spot near to which lurked this hidden danger. Then came the shortening of the cable, which brought the ship ninety yards nearer to the hidden danger. But for that active step, taken to prevent excessive swinging and sheering, I think that the inference must be drawn that the accident would not have happened. There were two movements of the ship without which the accident could not have happened, namely, anchoring in a particular place, and the shortening of the cable. The warlike operation took the vessel to an unusual destination. Lochalsh is not a port, nor was this an approach to a port where normally, I suppose, every foot of the approach would be well charted and well known. This was an open loch which was being temporarily used as a naval base for warships, where there were hidden and unknown rocks. Causation is to be understood as the man in the street would understand it, "on a broad view." Would not any ordinary man in the street, looking at the matter broadly, say that the accident in this case was caused by the ship being directed to anchor in a place where there was a hidden danger, and that the stranding was the consequence of the warlike operation on which she was so engaged? It was all part and parcel of the operation. The question of causation has been said to be a question of fact. Courts have not treated it as such; they have not been slow to differ from the conclusions of arbitrators if they did not agree with them. Maybe it would be nearer the truth to say that it is a question of the proper inference to be drawn from the facts found. That is how Lord Macmillan expressed it in the *Yorkshire Dale* case (2): "The learned arbitrator has found that the casualty . . . was 'the direct con- "'sequence' . . . . Your Lordships have, therefore, only "to decide whether that conclusion is justified on the facts "which the arbitrator has found and set out in the case "which he has stated. These facts have been narrated by the "Lord Chancellor, and, in my opinion, they justify the "arbitrator's conclusion."

I have come to the same view, viz., that the facts in the

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(1) [1942] A. C. 713.

(2) Ibid. 702.

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present case do justify the arbitrator's conclusion. I think that he drew the right conclusion, whether it is an inference of fact or a question of law. I so decide and uphold the award.

Appeal dismissed.

Solicitors for the respondents: *Thomas Cooper & Co.*
Solicitors for the claimants: *Hill, Dickinson & Co.*

H. G.

MORRISON *v.* JACOBS.

C. A.

1945

July 12, 13.

Scott, MacKinnon and Lawrence L.JJ.

Landlord and tenant—Rent restriction—Dwelling-house controlled—Tenancy for term of years—Expiration by effluxion of time—Tenant continuing in possession—Subsequent acceptance of rent by landlord—No evidence of new contractual tenancy—Landlord's right to sue for possession, without first serving notice to quit—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1; *s.* 16, *sub-s.* 3*—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1, *and sch.* I. (*h*).

Where the tenancy for a term of years of a dwelling-house, to which the Rent and Mortgage Interest Restrictions Acts apply, has expired by effluxion of time, and the tenant continues in possession of the house, the mere fact that the landlord accepts rent from the tenant at any time or times after the expiration of the contractual tenancy affords no evidence that the landlord has consented to a new contractual tenancy.

Per Scott L.J.: Where, in such circumstances, the landlord desires to claim possession of the dwelling-house on the ground that he reasonably requires the dwelling-house for his own occupation as a residence, pursuant to s. 3, sub-s. 1, of, and para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, he need not before suing serve any notice to quit on the tenant.

APPEAL from the Bow county court.

By an agreement made on June 7, 1939, Robert Morrison, the landlord, agreed to let No. 588, High Road, Leytonstone, to Hyman Jacobs, the tenant, for the term of one year certain from June 12, 1939, at the yearly rental of 208*l.*, payable by equal instalments of 4*l.* on the Monday of each week. By the terms of the agreement the tenant undertook to "give to the "landlord one month's notice of his intention to terminate

" the tenancy at the expiration of the term hereby granted " or otherwise." The landlord agreed to pay the rates. It was also agreed between the parties that at the expiration of the term of one year, the tenant should have the option of continuing his tenancy for a further period of three years certain at a like rent of 208*l.* per annum inclusive. At the expiration of the year, the tenant exercised his option and continued his tenancy for a further period of three years which expired on June 11, 1943. The tenant however continued in possession of the house and continued to pay the rent fixed by the agreement of June 7, 1939, which was accepted by the landlord, although the landlord, on July 26, 1943, and again on March 29, 1945, gave the tenant a week's notice to quit. The rateable value of the house exceeded 35*l*, but did not exceed 100*l*., and therefore was a " 1939 Act house " and one to which the Rent and Mortgage Interest Restrictions Acts applied. On April 27, 1945, the landlord, alleging that he required the dwelling-house for his own occupation as a residence, claimed possession thereof in the Bow county court under s. 3 of, and sch. I. (para. (*h*)) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The solicitor for the landlord did not rely on the notices to quit which had been given, but submitted that since the expiration of the contractual tenancy on June 11, 1943, the tenant remained in possession of the dwelling-house on a statutory tenancy under the Rent and Mortgage Interest Restriction Acts. The county court judge held that by reason of the tenant's continuing in occupation of the dwelling-house after June 11, 1943, and the acceptance of rent from him by the landlord, a continuing common law tenancy from year to year had been created, which had never been determined by six months' notice to quit expiring at the end of the year, and he dismissed the claim for possession. The landlord appealed.

A. W. Roskill for landlord: There was no evidence of a common law tenancy after June 11, 1943. When a contractual tenancy of a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts apply expires by effluxion of time, and the tenant remains in possession of the dwelling-house, paying rent, which is accepted by the landlord, he remains as a statutory tenant under those Acts. The landlord cannot obtain possession of the house except on certain specified grounds and with the approval of the court, and knowing this, the landlord's acceptance of rent does not imply the creation of any contractual tenancy. *Davies* v. *Bristow* (1) (not following *Hartell* v. *Blackler* (2)) and *Shuter* v. *Hersh* (3). The two notices to quit, each giving a week's notice, cannot be referable to a tenancy from year to year, and the fact that they were given is immaterial in this case. No notice to quit is required after the expiration of the contractual tenancy to terminate such a statutory tenancy, where a landlord is claiming possession of a dwelling-house for his own occupation as a residence. *Shuter* v. *Hersh* (3) and *Felce* v. *Hill* (4). The burden of proof that a new contractual tenancy was created after June 11, 1943, lay on the tenant and this he has failed to discharge. See s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938.

A. E. Holdsworth for tenant: By s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a tenant who by virtue of the provisions of that Act retains possession of a dwelling-house to which that Act applies is entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of the Act. In this case the tenant has retained possession of a dwelling-house to which the Rent Restriction Acts apply after the expiration of a tenancy for years paying to the landlord rent after that expiration which has been accepted by him. Accordingly, the presumption is that there is a new contract and tenancy from year to year. It is for the court to find the facts and to hold whether they establish that a new contractual tenancy has been created. That was here found by the county court judge and the Court of Appeal will not disturb his findings or the inference to be drawn from them. Where it is suggested that a statute limits rights at common law, it must be shown that it does so in clear and unambiguous terms, and the Rent Restriction Acts have not affected the position at common law. Foa in his Landlord and Tenant (6th ed.) writes at pp. 683–4: "Though "the parties cannot waive the notice [to quit] they may "waive the right to enforce actual quitting, by mutually "agreeing upon a new tenancy, whether on the terms of the "former or not, to commence from the time of its expiration. "And a mutual agreement to this effect may be implied

(1) [1920] 3 K. B. 428.
(2) [1920] 2 K. B. 161.
(3) [1922] 1 K. B. 438.
(4) (1923) 39 T. L. R. 673.

"from their acts which in every case may be regarded as "amounting either to an offer, or to an acceptance, of a new "tenancy." The two notices to quit were nullities since a good notice to quit should have been for six months, expiring at the end of the year. Had the notices to quit been good, a new tenancy from year to year would have been created after each by the acceptance of rent by the landlord : *Goodright dem. Charter* v. *Cordwent* (1). A mere demand of rent is not necessarily sufficient to create a new common law tenancy: *Blyth* v. *Dennett* (2). The landlord's right to possession is not abolished by the Rent Restriction Acts, but only circumscribed. There is no provision in these Acts that if a tenant holds over, he must do so as a statutory tenant. The provision in s. 16, sub-s. 3, of the Act of 1920, that the acceptance of rent by the landlord for a period not exceeding three months from the expiration of a notice to quit shall not be deemed to prejudice any right to possession of the dwelling-house shows that this protection does not extend beyond the period of three months. The later case of *Shuter* v. *Hersh* (3) narrows down what was said in *Davies* v. *Bristow* (4) since it was there held that there was no necessity for the landlord to give the tenant a fresh notice to quit before raising the rent, unless a new tenancy had been actually created. See also *Kerr* v. *Bryde* (5).

A. W. Roskill replied.

SCOTT L.J. : In my opinion the county court judge in deciding that there was here a continuing common law tenancy from year to year came to his conclusion through an error of law. He based his conclusion on the consideration that before the era of the Rent and Mortgage Interest Restrictions Acts, where a tenant remained in occupation after the expiration of a tenancy for a term of years—what has been loosely called "holding over"—and the landlord in certain circumstances had accepted rent from him after that expiration, an inference was justified that the landlord had entered into a new tenancy agreement with the tenant for a tenancy from year to year, or one with the characteristics of such a tenancy. It is erroneous, I think, to hold, in the case of a dwelling-house to which the Rent Restrictions Acts apply, that where the tenant has remained in possession after a term of years and the landlord has accepted rent from the tenant, any such inference of a consensus ad idem between the parties to a new common law tenancy arises, because before the passing of those Acts, in certain circumstances such an inference could be drawn. The relevant consideration is that in the case of a dwelling-house to which the Rent Restrictions Acts apply, where a term of years has expired, the landlord cannot obtain possession of the house unless he brings himself within the terms of certain provisions of those Acts now contained for the most part in sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

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(1) (1795) 6 T. R. 219.
(2) (1853) 13 C. B. 178.
(3) [1922] 1 K. B. 438.
(4) [1920] 3 K. B. 428.
(5) [1923] A. C. 16.

It was contended for the tenant that s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which may be said to read into a statutory tenancy under the Rent Restrictions Acts the terms and conditions of the previous contractual tenancy, here applies. The provisions of that sub-section seem to me irrelevant to the present case. The sole question before the court is whether after the expiration of the contractual tenancy the mere fact of the landlord receiving rent for the dwelling-house from the tenant affords any evidence that the landlord had entered on a new contractual tenancy to take the place of the tenancy which had expired. In my opinion, it does not. The true view is that the landlord takes the rent, knowing that the tenant is granted a statutory tenancy by the Rent Restrictions Acts and that his right to gain possession of his dwelling-house depends entirely on his establishing that he brings himself within the conditions laid down by the Acts. In this case at the expiration of the lease on June 11, 1943, the landlord did not want the dwelling-house for his own occupation as a residence. Early in 1945, he did want it for his own occupation and for that reason, on March 29, 1945, he served on the tenant a week's notice to quit the premises. The contractual tenancy having expired, it was not necessary for the landlord to serve the tenant with any notice to quit: all that was necessary was that he should come to court and satisfy the judge that he reasonably required possession of the dwelling-house for his own occupation as a residence: that entitles him to an order unless the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order than by refusing to grant it.

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There being no evidence to support the findings of the county court judge, there must be a new trial on this issue under s. 3 of and sch. I. para. (*h*) to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. It will be before another judge.

MacKinnon L.J.: I agree. This was a claim by the owner of a house to recover possession thereof from a man who was in occupation of it. The defence of the man who was in occupation is: "I am a tenant of yours pursuant to a lease "granted by you to me for a yearly tenancy. Such a lease "you can only put an end to by a six months' notice to quit. "You have given no such notice and, therefore, you have no "enforceable claim for possession." To that contention the landlord answered: "The only contract of demise between us "was one for four years, which expired by effluxion of time "on June 11, 1943. Since the expiration of that demise you "have remained in possession, not by reason of any new "demise from me, but because the Rent and Mortgage Interest "Restrictions Acts deprived me of the power to turn you "out." The tenant seeks to reply by saying: "I agree "that my original contractual lease was ended, as you say, "but I stayed on and paid the rent and you have accepted "the rent and by that conduct you have granted me a new "contractual demise." I am satisfied that the last contention of the tenant is entirely without foundation and, that it is so, is sufficiently shown by the principle of the decision in *Davies* v. *Bristow* (1). At common law, if at the expiration of a tenancy a landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may, with reason, be held to have entered into a new contract of demise. But the essential factor in those circumstances is that the landlord voluntarily abstains from turning the tenant out. When the tenant remains in possession, not by reason of any such abstention by the landlord, but because the Rent and Mortgage Interest Restrictions Acts deprive the landlord of his former power of eviction, no such inference can properly be drawn. That is the very obvious and cogent basis of the decision in *Davies* v. *Bristow* (1). Some reliance was placed by Mr. Holdsworth on s. 16, sub-s. 3, of the Increase of Rent

(1) [1920] 3 K. B. 428.

and Mortgage Interest (Restrictions) Act, 1920, which provides that the acceptance of rent by a landlord for a period not exceeding three months from the expiration of a notice to quit shall not be deemed to prejudice any right to possession of the premises. I gathered that counsel's contention was that after this period of three months, the acceptance of rent by the landlord would afford some evidence of the creation of a new contractual tenancy. The answer to that contention is to be found in the judgment of Scrutton L.J. in *Shuter* v. *Hersh* (1) where he said: "If, however, *Hartell* v. *Blackler* (2) "is not the law and the law is as stated in *Davies* v. "*Bristow* (3), there is no reason why it should be taken that "acceptance of rent after the expiration of the three months "should prejudice the position and create a new tenancy." Mr. Holdsworth, by his argument was seeking to rely on the decision in *Hartell* v. *Blackler* (2) which was not followed in *Davies* v. *Bristow* (3). I agree that the appeal should be allowed and an order made for the hearing of the case on its merits by another county court judge.

LAWRENCE L.J.: I agree and I desire only to add that s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, appears to me to show that the mere acceptance of rent cannot give rise to a new contractual tenancy, because it provides that: "a tenant who by virtue "of the provisions of this Act retains possession of any "dwelling-house to which this Act applies shall, so long as he "retains possession, observe and be entitled to the benefit of "all the terms and conditions of the original contract of "tenancy . . ." Therefore, a tenant who retains possession under the Act, and so creates a statutory tenancy, must observe the terms of the original contract. It follows that payment of rent, which is one of the terms of that original tenancy, cannot give rise by itself to a new contractual tenancy.

Appeal allowed. New trial ordered.

Solicitors for plaintiff: *Breeze, Benton & Co.*
Solicitor for defendant: *William Daybell.*

(1) [1922] 1 K. B. 438, 450.
(2) [1920] 2 K. B. 161.
(3) [1920] 3 K. B. 428.

C. G. M.

Dictum of Lord Greene, M.R. *at* p. 592, *applied.* Darling *v.* A.-G. [1950] 2 All E.R. 793.

Council and Middlesex County Council [1945] K. B. 584. Considered. Whiting *v.* Middlesex County Council and Harrow Urban District Council [1948] 1 K. B. 162

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Jan. 30, 31; Feb. 20; July 16.

Lord Greene M.R., MacKinnon L.J. and Uthwatt J.

FISHER *v.* RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL AND MIDDLESEX COUNTY COUNCIL.

Emergency legislation—Air-raid shelter erected on highway by local authority under statutory powers—Shelter unlighted—Collision of motorist with shelter—Duty of local authority.

The plaintiff was injured when a motor-car which he was lawfully driving at night on a highway collided with an unlighted air-raid shelter, erected on the highway by a local authority in pursuance of their statutory powers under the Civil Defence Acts, 1937 and 1939. Street-lighting was prohibited at that time, but the shelter might have been lit by red lamps at each corner, and sometimes was so lit. It was admitted that if the defendants owed any duty to the plaintiff they had been negligent in failing to light the shelter, but it was contended that they owed no such duty:—

Held, that the true view as to the duty of local authorities with regard to obstructions erected under statutory powers was that the date of the erection of the obstruction, and the purpose for which it was used, were (apart from special circumstances, or special language in the statute), immaterial; that the duty to take reasonable care to prevent danger to the public was present throughout; that so long as the streets were properly lit, the duty was ipso facto performed, but when the street lighting was suspended for any reason—whether by lighting restrictions, accidental breakdown, or (outside London), by the exercise of an option on the part of the local authority not to light—it became the duty of the local authority to take such steps to safeguard the public, by special danger lights or otherwise, as in the circumstances of the case were reasonably possible.

Principles of *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 App. Cas. 430, and *Great Central Ry. Co.* v. *Hewlett* [1916] 2 A. C. 511, discussed.

Morrison v. *Sheffield Corporation* [1917] 2 K. B. 866, *Polkinghorn* v. *Lambeth Borough Council* (1938) 158 L. T. 127, and *Foster* v. *Gillingham Corporation* (1942) 1 All E. R. 304, approved and followed.

Wodehouse v. *Levy* [1940] 2 K. B. 561, *Lyus* v. *Stepney Borough Council* [1941] 1 K. B. 134, and *Fox* v. *Newcastle Corporation* [1941] 2 K. B. 120, disapproved and not followed.

Appeal from Macnaghten J.

In pursuance of their powers under the Civil Defence Acts, 1937 and 1939, the second defendants, the County Council of Middlesex, erected an air-raid shelter in the roadway at Fore Street, in the Urban District of Ruislip-Northwood, and the management of the shelter was undertaken by the first defendants, Ruislip-Northwood Urban District Council.

Provision was made for the lighting of the shelter by a red electric lamp at each corner, but the evidence was that these lamps were sometimes lit at night and sometimes not. In the early hours of the morning of July 21, 1942, the plaintiff Fisher, who was a night chauffeur employed by the London Passenger Transport Board, was driving a motor car along Fore Street, which was an unknown route to him, when he collided with the air-raid shelter, which was then unlighted, and sustained injuries.

Macnaghten J. held, following *Fox* v. *Newcastle Corporation* (1), that the defendants were under no duty to light the shelter; and, further, that the plaintiff could not rely on the principle of *Baldock* v. *Westminster City Council* (2), since, as a stranger to the district, he could not say that he was trapped by a failure to follow a self-imposed practice of always lighting street shelters. He gave judgment for the defendants, and the plaintiff appealed.

Comyns Carr K.C. and *G. H. Oliver* for the plaintiff. A preliminary question is which of the defendants was responsible for the failure to keep the shelter lighted? The defendant county council is the only authority in the area in question for A.R.P. matters, including the erection of shelters and the employment of wardens. It is admitted that there were red lamps at the four corners of this shelter, and that it was intended to keep them lit permanently. The shelter was erected on the highway under the powers conferred by the Civil Defence Act, 1939, s. 9, and the defendants rely on authority to say that there is no obligation to keep such a shelter lighted. The answer is that it must in some way be made safe for traffic. In *Geddis* v. *Proprietors of Bann Reservoir* (3) the principle of law is stated by Lord Blackburn that no action will lie for what is done under statutory authority, if it be done without negligence. That principle was applied in *Great Central Ry. Co.* v. *Hewlett* (4), a case where a post had been erected before the last war, when the streets were compulsorily lighted, so that danger arose when good road lighting ceased. So too, in *Greenwood* v. *Central Service Co., Ld.* (5), the general duty to light streets had been terminated, power being given to light street obstacles by small lights. That case made it clear that there is an obligation to take reasonable care. In London there was, before the war, an absolute obligation to light streets under the Metropolis Management Act, 1855, but in the country, including the area in question here, s. 161 of the Public Health Act, 1875, applies, and street lighting is permissive only: see *Sheppard* v. *Glossop Corporation* (1). If streets are not lit, the local authority must find some other way of showing up obstructions in the highway; at any rate in the case of obstructions erected after general lighting of streets has been prohibited. *Wodehouse* v. *Levy* (2) is another case where an obstruction was erected before lighting of streets was restricted.

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(1) [1941] 2 K. B. 120.

(2) (1918) 88 L. J. (K. B.) 502; 120 L. T. 470.

(3) (1878) 3 App. Cas. 430, 455.

(4) [1916] 2 A. C. 511.

(5) [1940] 2 K. B. 447.

[LORD GREENE M.R. May not the duty in regard to an obstruction in the highway be to take reasonable care to ensure that it shall not be a danger?]

Yes, and the question here has nothing to do with lighting, save as one means of taking reasonable care. Two later cases are *Lyus* v. *Stepney Borough Council* (3), a case where a sandbin erected in 1936 only became a danger when street lighting was restricted, and *Fox* v. *Newcastle-upon-Tyne Corporation* (4). *Polkinghorn* v. *Lambeth Borough Council* (5) is directly in point here. It was a case where there was power to light a tram loading island, but the light was out when the accident occurred. There are two possible views of the position: (1.) that the onus is on the defendants to show reasonable cause why the shelter was not lighted; or (2.) that there is a necessary implication that as the shelter was put in the road, there is a duty to make it safe. It makes all the difference here that the shelter was erected after the restrictions on street lighting had come into force, otherwise it would be difficult to distinguish *Lyus* v. *Stepney Borough Council* (3), but if possible we should wish to contend that that case was wrongly decided. The position really is that there have been inconsistent decisions, and the court is entitled to give reasons why one line of authority should be preferred to the other. The dissenting judgment of du Parcq L.J. in *Fox* v. *Newcastle Corporation* (6) should be preferred to that of the majority, by which, it is submitted, the court is not bound, because it is inconsistent with the principles laid down in many cases.

[MACKINNON L.J. My difficulty in that case rested chiefly on *Great Central Ry. Co.* v. *Hewlett* (1). If it were possible for us to say so of a House of Lords decision, I should say that *Hewlett's* case (1) was inconsistent with *Geddis* v. *Proprietors of Bann Reservoir* (2).]

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(1) [1921] 3 K. B. 132.
(2) [1940] 2 K. B. 561.
(3) [1941] 1 K. B. 134.
(4) [1941] 2 K. B. 120.
(5) (1938) 158 L. T. 127.
(6) [1941] 2 K. B. 120, 128.

In deciding *Great Central Ry. Co.* v. *Hewlett* (1) the House had before them *Geddis* v. *Proprietors of Bann Reservoir* (2), and other cases which had followed it. They distinguished it on a narrow ground, that Parliament, knowing that a particular obstruction existed, authorized its continuance. *Great Central Ry. Co.* v. *Hewlett* (1) is confined to its special facts. If it lays down any principle, it does not apply to the present case, which is within the principle of *Geddis* v. *Proprietors of Bann Reservoir* (2). *Lyus* v. *Stepney Borough Council* (3) was an excessive extension of the principle of *Hewlett's* case (1) which is limited to cases where Parliament, knowing of an existing obstruction, expressly authorizes its continuance.

[MacKinnon L.J. I cannot see any essential difference in principle between Parliament saying: " You may maintain " an existing nuisance," and " You may erect a new nuisance."]

In the former case you have precise instructions from Parliament, in the latter you are merely authorized to do something.

[MacKinnon L.J. It seems an extraordinarily narrow distinction. In *Hewlett's* case (1) the post was knocked down and Hewlett could not get damages, but, according to your argument, if they replaced the post and someone else ran into it, he could recover.]

Not if the post was replaced in exactly the same way, though the local authority might be liable if they were negligent in the course of replacement. As to the duty of lighting, it is there all along. While normal street lighting exists, nothing further is needed, but when lighting restrictions come into force it becomes necessary to do something about the obstructions. [They referred to *Foster* v. *Gillingham Corporation* (4).] The principle is this: If you have a statutory power to do something which must in its nature be a nuisance, you may do it provided you take all reasonable steps to minimize that nuisance. There are a large number of irreconcilable cases, but the only one really in our way is *Fox* v. *Newcastle-upon-Tyne Corporation* (5). We find difficulty in distinguishing it, and equal difficulty in reconciling it with the other authorities,

(1) [1916] 2 A. C. 511.
(2) 3 App. Cas. 430.
(3) [1941] 1 K. B. 134.
(4) (1942) 111 L. J. (K. B.) 364.
(5) [1941] 2 K. B. 120.

especially *Baldock* v. *Westminster City Council* (1), the principle of which is exactly applicable to this case. As a matter of legal principle the duty on the defendants is not a duty to light, but a duty to take care. It may well be that in most cases the obvious way to take care is to provide such light as is allowable. We put our case in both ways: first, we say there is a self-imposed duty, and on that we have a much stronger case than in *Baldock* v. *Westminster City Council* (1). But, apart from any self-imposed duty, a duty arises to minimize danger by all proper means. The defendants themselves thought the painting of white bands insufficient, and decided to maintain a lamp at each corner, but took no steps to see that it was kept alight.

Harold Williams for the defendants. I accept that the local authority responsible is the Middlesex County Council. The Civil Defence Act imposed on county councils the duty of making a scheme under which local authorities might fulfil certain functions. No schemes were completed when war broke out, and the authorities had to go ahead without waiting for schemes. This case has nothing to do with street lighting, and cases under s. 130 of the Metropolis Management Act, 1855, cannot apply outside London. Obstruction of a highway is a nuisance. That rule is as binding on the highway authority as on anyone else, subject to statutory permission. They have a common law duty to repair, and power to improve the highway, but no statutory power to obstruct for the purpose of carrying out that duty or exercising that power. But it has always been assumed that a necessary obstruction was lawful. Statutes have often provided that highway authorities and others may obstruct, e.g., by the erection of refuges and lamp-posts, and even by putting a raised footpath in an old highway. In that state of affairs came the Civil Defence Acts. In *Foster* v. *Gillingham Corporation* (2), which is not very adequately reported, the power was not a power to obstruct the street itself, but a common law power to close a highway which was dangerous. It has always been held that if in repairing a highway it is necessary to leave it in a state in which it is dangerous to pass over it, it is negligent not to close it. I rely on *Fox* v. *Newcastle-upon-Tyne Corporation* (3) which was exactly like the present case except that there the plaintiff was riding a bicycle instead of driving a car, and which is not inconsistent with the authorities. One always has to start with *Geddis* v. *Proprietors of Bann Reservoir* (1). The distinction between that case and *Great Central Ry. Co.* v. *Hewlett* (2), as was pointed out by Lord Sumner, was that there was an overt act, and they did not merely leave what Parliament had authorized. If a railway company is authorized to cross a road by a level crossing injury to a member of the public arising solely from that fact affords no cause of action, but if they are negligent in using the train, there is a cause of action.

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(1) 88 L. J. (K. B.) 502; 120 L. T. 470.

(2) 111 L. J. (K. B.) 364.

(3) [1941] 2 K. B. 120.

[LORD GREENE M.R. Suppose a railway company was empowered in general terms to construct level crossings, would it be entitled to put a level crossing without gates, or to leave those gates unlit ?]

The first question is what duty did the defendants, or either of them, owe to this plaintiff which they failed to perform ? There is no question of street lighting. It does not seem to have been brought to the notice of the court in *Fox* v. *Newcastle-upon-Tyne Corporation* (3) that the law is different outside London, but that has no present importance since the duty which existed before the war was brought to an end by the lighting restrictions. The position is the same as in *Great Central Ry. Co.* v. *Hewlett* (4) where there was also no duty to light. On the London cases I have little to add. In *Greenwood* v. *Central Service Co., Ld.* (5) it was sought unsuccessfully to say that there was a duty to light. In the other cases, at the time when the erection of the obstruction was authorized it was said that the defendants were under an obligation to light, and that it was not negligent to omit to mark the obstruction in other ways. It is difficult to see how the duty at common law to indicate an obstruction—which is a continuing duty—can be excused because many years ago it was unnecessary to do anything about it owing to street lighting.

[LORD GREENE M.R. Would a local authority be entitled to put up a shelter at a blind corner, and give no warning, merely because the statute said nothing about it ?]

That might come within the principle of *Geddis* v. *Proprietors of Bann Reservoir* (1), whereas this case does not. If Parliament has given the power, and has not put a restriction on it, there is no duty. This court is now bound to that view by authority, and if not, I submit that it is right.

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(1) 3 App. Cas. 430.
(2) [1916] 2 A. C. 511, 523.
(3) [1941] 2 K. B. 120.
(4) [1916] 2 A. C. 511.
(5) [1940] 2 K. B. 447.

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The plaintiff's second contention was that if we are not under a duty at common law, we have assumed a duty, and are bound by it. The authorities other than *Baldock* v. *Westminster City Corporation* (1) are summarized by Hilbery J. in *Knight* v. *Sheffield Corporation* (2). While we had no doubt assumed a duty to some people, we had assumed no duty to the plaintiff, who had never been there before.

[LORD GREENE M.R. My difficulty is that *Baldock's* case (1) was not rested on that. It has been explained in this court; it is referred to in *Wodehouse* v. *Levy* (3).]

There can be no foundation for this case in nuisance; we are under no statutory or common law duty to light, and we have assumed no such duty.

Comyns Carr K.C. replied.

Cur. adv. vult.

Feb. 20. The Court intimated that the appeal was allowed, but owing to the illness of LORD GREENE M.R., the reasons for the judgment were postponed.

July 16. The following written reasons of the court were handed down to counsel, but were not read in court.

LORD GREENE M.R. On July 21, 1942, during the hours of darkness, the appellant was driving a motor car in Fore Street, Ruislip, in the County of Middlesex. It is not now suggested that he was driving otherwise than with due care, and he was on his proper side of the road. There was, unknown to him, a surface air-raid shelter standing in the roadway directly in his path, and his car came into collision with it. As a result he suffered personal injuries and loss of earnings for which the sum of 199*l.* 6*s.* 0*d.* has been agreed. The shelter was equipped with a suitable external lighting system consisting of red danger lamps. These lamps were controlled by a switch inside the shelter, and it was the duty of the air raid wardens, in whose area the shelter was situated, to see that the light was duly turned on at the appropriate time. It is not necessary to go into the precise arrangements in force with regard to the control of the lights and the custody of the key of the shelter, or to inquire how it came about, on the occasion in question, that the lights were not in operation. They were not in operation,

(1) 88 L. J. (K. B.) 502; 120 L. T. 470.

(2) (1942) 167 L. T. 203.

(3) [1940] 2 K. B. 561.

and it is not now disputed that this was the real cause of the accident. Nor is it disputed that if there was a duty on the respondents, who were responsible for the shelter, to take reasonable steps to warn the public of its existence by lighting or otherwise, that duty was not performed. Whether this was due to lack of due care in persons for whom the respondents were responsible, or to lack of a proper system of management and supervision, or to both, the liability of the respondents is not put in issue by them, save upon the one essential question, namely, was there, in the circumstances, a duty towards the plaintiff, as a member of the public lawfully using the highway, to take reasonable steps to warn him of the danger?

During the last war, and during this present war, and in the interval between them, the question of liability for accidents caused by unlighted objects or structures on roadways or footpaths has come up for decision on a number of occasions. During the present war there have been several decisions of this court which (or, at any rate, one of which), if binding on this court, must compel us to decide this appeal in favour of the defendants. But it is argued on behalf of the plaintiff that these cases (or, at any rate, the one referred to) were wrongly decided, that the decisions are inconsistent with at least one previous decision of this court, and with principles laid down by the House of Lords, and that in accordance with our decision in *Young* v. *The Bristol Aeroplane Co.* (1), it is open to us to review the earlier decisions and, if they are found to conflict, to select that which, in our opinion, is correct. The task to which we are thus invited to address ourselves is one which might more suitably have been performed by a fuller court, but circumstances made this impossible. We have unanimously come to the conclusion that the plaintiff is in the right, and judgment to that effect has been given. It only remains to give our reasons.

The shelter was provided by the second-named defendants, the County Council of Middlesex, and was constructed on the highway under the powers contained in the Civil Defence Act, 1939. That Act, so far as relevant, provides as follows: Section 9, sub-s. 1:—"Subject to the provisions of this "section, the local authority may provide a public air-raid "shelter on any highway and may for that purpose construct "works in or on the highway . . . ." The provisions to which the power is made subject have no relevance to the present case. The management of the shelter, on behalf of the Middle-

(1) [1944] K. B. 718.

sex County Council, had been undertaken by the first named defendants, the Ruislip-Northwood Urban District Council. If a duty existed to take reasonable care to ensure that the shelter should not be a source of danger to persons lawfully using the highway, and that duty was not performed, both defendants are admittedly liable to the appellant.

Macnaghten J. held that, according to authorities binding on him, there was no duty, either under the Civil Defence Act, 1939, or under any other statute, or by common law, to light the shelter. He relied particularly on the decision of this court in *Fox* v. *Newcastle-upon-Tyne Corporation* (1). The argument on behalf of the plaintiff was a simple one. *Fox's* case (1), it was said, and certain observations in other cases decided in this court during the course of the present war, were based on a misapprehension of the decision of the House of Lords in *Great Central Ry. Co.* v. *Hewlett* (2), and were inconsistent with principles long established by other decisions of the House of Lords, and with at least one decision of this court, *Morrison* v. *Sheffield Corporation* (3). An examination of the authorities confirms the view expressed by Goddard L.J. (as he then was) in *Foster* v. *Gillingham Corporation* (4), that it was "desirable "that the cases decided during the present war relating to "collisions with street refuges, sandbins and the like during "the hours of blackness should receive further consideration."

The duty of undertakers in respect of the safety of works executed under statutory powers has been considered on many occasions. Statutes conferring such powers do not as a rule, in terms, impose a duty on the undertakers to exercise care in the construction or maintenance of the works. No such duty was imposed by the Civil Defence Act, 1939, in respect of shelters constructed under its powers. Nevertheless, it is clearly established that undertakers entrusted with statutory powers are not in general entitled, in exercising them, to disregard the safety of others. The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorizes the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons. So to hold would make nonsense of

(1) [1941] 2 K. B. 120.
(2) [1916] 2 A. C. 511.
(3) [1917] 2 K. B. 866.
(4) 111 L. J. (K. B.) 364, 366.

the statute. If, on the other hand, the legislature authorizes the construction and maintenance of a work which will be safe or dangerous to the public according as reasonable care is or is not taken in its construction or maintenance, as the case may be, the fact that no duty to take such care is expressly imposed by the statute cannot be relied on as showing that no such duty exists. It is not to be expected that the legislature will go out of its way to impose express obligations or restrictions in respect of matters which every reasonably minded citizen would take for granted. If, for instance, in an area where there is no obligation to light the streets—and the area in question here is one—a local authority is empowered to erect a pedestrian refuge in the middle of the highway, but no express obligation is imposed to take reasonable steps to ensure that it will not be a source of danger, it would violate one's sense of good citizenship to hold that the authority could erect a refuge in an unlighted street and take no steps to warn the public of its existence: *Sheppard* v. *Glossop Corporation* (1). As will be seen, some confusion has been introduced into the cases by treating the alleged duty as a duty to light the obstruction. This appears to me to be a misconception. Lighting in such a case is no doubt the obvious and simplest measure of precaution during the hours of darkness. But the duty, if it exists, is, as I see it, not a duty to light (unless that be, in the circumstances, the only possible effective precaution) but a duty to take reasonable steps to prevent the obstruction becoming a danger to the public. In a given case there may be other steps which can be taken which would be as effective as lighting, or which a jury might hold to be sufficient. Moreover, the duty, if it exists, must exist in the daytime as well as at night, since certain kinds of obstruction may be dangerous in the daytime unless suitable warning is given of their existence. Thus an obstruction might be placed at a blind corner in such a position that a person driving with reasonable care would be likely to run into it. In such a case the duty, if it exists, would not be merely a duty to light the obstruction at night—it would be a duty to take reasonable steps to give the public due warning of its existence both at night and during the day.

I will now proceed to examine the relevant authorities on which reliance was placed by counsel on the one side or the other. In *Geddis* v. *Proprietors of Bann Reservoir* (2), the

(1) [1921] 3 K. B. 132.

(2) 3 App. Cas. 430.

undertakers were empowered by statute to construct a reservoir for the purpose of maintaining a steady flow of water in the River Bann. For this purpose they diverted water from the River Muddock into the reservoir, and sent the water from the reservoir into the channel of the River Muddock at a lower point and so into the River Bann. Owing to failure to cleanse this part of the channel of the Muddock, water overflowed and damaged the plaintiff's land. The principal question debated in the House of Lords was whether the undertakers had power under the statute to cleanse the channel of the Muddock. It was held that they had. The position, therefore, was that the undertakers, having the power (but not in terms the duty) to take the necessary steps to prevent their operations becoming a danger to their neighbours, omitted to take those steps. It is sufficient to quote two passages. Lord Hatherley (1) said : " In carrying it [scilicet, the object of the Act] into effect, " where the means exist of providing against injurious conse- " quences to others, I apprehend that the true construction " of all such powers given to companies is this : You *may* carry " out your work to its full extent, and in some cases you *must* " carry it out to its fullest extent, in the manner provided by " the Act, but in so doing you shall not create any needless " injury—you shall use all those precautions against injury to " others which you would use against injury to yourselves in " carrying on a similar work, and if we find that in carrying " out your powers damage has been done by you, the law will " say that the powers which you can exercise shall be exercised " for the prevention of mischief." Lord Blackburn (2) : " For I take it, without citing cases, that it is now thoroughly " well established that no action will lie for doing that which the " legislature has authorized, if it be done without negligence, " although it does occasion damage to anyone ; but an action " does lie for doing that which the legislature has authorized, " if it be done negligently. And I think that if by a reasonable " exercise of the powers, either given by statute to the pro- " moters, or which they have at common law, the damage " could be prevented, it is, within this rule, ' negligence ' not " to make such reasonable exercise of their powers. I do not " think that it will be found that any of the cases (I do not cite " them) are in conflict with that view of the law." The conclusion followed necessarily once it was held that the power to cleanse the channel of the Muddock existed. In the present case the power to take reasonable steps to prevent the shelter becoming a danger existed, without the necessity of an enactment to that effect such as was required in *Geddis* v. *Proprietors of Bann Reservoir* (1), where, apart from statute, the undertakers had no power to cleanse the bed of the Muddock.

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(1) 3 App. Cas. 450.

(2) Ibid. 455.

The cause of action is based on negligence: "an action does "lie for doing that which the legislature has authorized, if it "be done negligently," as Lord Blackburn said (2). Negligence is the breach of a duty to take care. That duty arises by reason of a relationship in which one person stands to another. Such a relationship may arise in a variety of circumstances. It will, to take a simple instance, arise when a person exercises his common law right to use the highway—by doing so he places himself in a relationship to other users of the highway which imposes upon him a duty to take care. Similarly, if the right which is being exercised is not a common law right but a statutory right, a duty to use care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded. If, for instance, the statute expressly authorizes the doing of a specific act in a defined manner, no liability arises if the act is done in the manner defined, even if by taking some additional precaution a greater degree of safety could be attained. The question, therefore, in any given case appears to resolve itself into this: does the statute, on its true construction, in authorizing the act in question, exclude the duty of taking care in its performance? An example of cases where the duty is excluded is to be found in *Great Central Ry. Co.* v. *Hewlett* (3). In that case the railway company, without any authority, erected gate posts in the highway which constituted an obstruction. Later the company obtained an Act which empowered them to "maintain" the posts and to replace them when necessary on the same site. During the first world war the street was darkened in compliance with the lighting regulations then in force, but the company took no steps to warn the public of the existence of the posts, either by means of red lights (which would have been permitted under the regulations) or in any other manner. A taxicab collided with one of the posts and was damaged. It was held that the driver of the cab had no remedy. Lord Parker stated the general principle in the following terms (4): "My Lords, it is

(1) 3 App. Cas. 430.
(2) Ibid. 456.
(3) [1916] 2 A. C. 511.
(4) Ibid. 519.

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"undoubtedly a well-settled principle of law that when "statutory powers are conferred they must be exercised with "reasonable care, so that if those who exercise them could by "reasonable precaution have prevented an injury which has "been occasioned, and was likely to be occasioned, by their "exercise, damage for negligence may be recovered." He then pointed out that the only statutory power which the company could be said to be exercising was the power to maintain the posts or rather the negative element in that power by which the company was relieved of the obligation of removing them. The company, therefore, had done nothing, since they had merely refrained from removing the posts. The risk, he said, arose not from something which the company was doing (since ex hypothesi they were doing nothing) but "from the existence "of the gate posts legalized by the Act coupled with the "diminution of light necessitated by the exigencies of the war." He then said this: "It is reasonably certain that the legislature "was, under the circumstances which prevailed when the Act "was passed, satisfied that there was no appreciable risk to the "public; otherwise the legalization of the obstruction without "expressly providing precautions to obviate the risk would be "inexplicable. The change of circumstances cannot be relevant "on any question of construction." In other words, if I follow rightly, the Act must be construed with regard to the circumstances existing when it was passed, i.e., the normal conditions of obligatory street lighting: and if, in those conditions, on the true interpretation of the statute, no obligation to light the obstruction arose, the fact that street lighting was subsequently restricted under the lighting regulations could not impose such an obligation. I hope that I shall not be thought guilty of disrespect if I say that I find some of this reasoning a little difficult to follow. In the first place, the posts were situated in the Metropolitan area, where street lighting was at the date of the Act compulsory: if they had been in an area where street lighting was optional under s. 161 of the Public Health Act, 1875 (as is the case in the area where the shelter now in question was situated) the result might apparently have been different, since the Act would then have had to be construed with reference to the fact that the local authority could at any moment have discontinued the lighting of the streets. Moreover, the emphasis which is laid on the absence of any action by the railway company would have been out of place if the company had exercised its powers to replace the posts. In that case it could not have been said that the company had " done nothing at all " since it would have exercised a positive power. It would apparently follow that if, as a result of Mr. Hewlett's unfortunate accident, the post had been knocked down and the company had replaced it by a new post, and another taxi cab had collided with the new post, the driver could have recovered. However this may be, the decision is, of course, binding on this court. But I cannot regard it as laying down any new principle. It turned on the construction which the House found it possible to place on a very special statutory provision in circumstances widely different from those in the present case. In the present case the power exercised was the positive power to erect a shelter in the highway, and it would, I think, be playing with words to say that at the time of the accident all that the defendants were doing was to exercise the negative right not to pull it down. Moreover, at the date when the shelter was erected, not only was there no obligation on the local authority or anyone else to light the street, but lighting regulations were in force similar to those which applied in *Great Central Ry. Co.* v. *Hewlett* (1). These facts are, in my opinion, sufficient to distinguish the present case from *Hewlett's* case (1) which stands in a class by itself.

Lord Sumner (2) treated the case as " one in which one party " lawfully maintains in a highway something which is capable " of becoming dangerous to the public unless another party " [scilicet the lighting authority] takes steps to avert that danger, " but where those steps have not been taken. . . . Whether " . . . the danger becomes operative through negligent " omission by the party who ought to have averted it or, as here, " it becomes operative under circumstances that excuse or " justify that omission [scilicet, the lighting regulations] " cannot be material to the obligations of the party who lawfully " maintains the structures in the highway." He then proceeds to distinguish (among other cases) *Geddis* v. *Proprietors of Bann Reservoir* (3) on two grounds, viz., that in those cases first " the legislature had authorized undertakers to do overt acts " which, in the natural course of things, were likely to prejudice " members of the public," (4) and, secondly, " the authority is " given in general terms," from which fact it was reasonable to infer that the legislature " meant them to exercise their

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(1) [1916] 2 A. C. 511.

(2) Ibid 523.

(3) 3 App. Cas. 430.

(4) [1916] 2 A. C. 511, 524, 525.

" authority with reasonable care and not without it." In the case before him " the authority is specific and precise, the " thing authorized is not an activity at all ; the section leaves " the railway company no selection or choice. It tells them to " let things alone." I hope that I shall not be thought hypercritical if I respectfully suggest that for once there is an inaccuracy in the language used by Lord Sumner. He says that the section left the company " no selection or choice. " It tells them to let things alone." The section surely did not tell the company to do anything ; it merely empowered them to leave the posts alone. The statute, I should have thought, did leave the company a choice, viz., the choice between exercising and not exercising this power. Whether unaided by this authority I should have come to the same conclusion is, of course, immaterial, but I may perhaps point out that the distinction between doing nothing as the result of a deliberate act of volition and doing something might, in the circumstances, be thought to be a rather fine one. It might even have been thought that by exercising its choice in favour of leaving the posts standing, the company was deliberately placing itself in a relationship to the public from which there arose a duty to take care. I only make these observations in order to emphasize my view that the decision turned on a very narrow point and cannot be regarded as making an inroad on the general principle. This is important, in view of the interpretation which has been placed on the decision by cases decided in this court during the present war. Lord Wrenbury, again, based his judgment on the proposition that "if the duty " or authority be simply not to do an act—merely to leave " things as they are—it is impossible to be negligent in not " doing anything."

Great Central Ry. Co. v. *Hewlett* (1) was distinguished in *Morrison* v. *Sheffield Corporation* (2), a decision of this court on which the present plaintiff mainly relies. There the local authority had exercised its power of planting trees in the highway and protecting them by guards under s. 43 of the Public Health Acts Amendment Act, 1890. The section provided that the power should not be exercised so as to hinder the reasonable use of the highway by the public. The district in question was presumably one in which street lighting (in ordinary times) was not compulsory as it is in the Metropolis. The corporation had planted trees and surrounded each tree

(1) [1916] A. C. 511, 524, 525. (2) [1917] 2 K. B. 866.

with an iron spiked guard. After the coming into force of an order that all street lights were to be extinguished at a certain hour, the plaintiff, in the darkness, came into contact with one of the guards and suffered serious injury. The accident took place seventeen days after the coming into force of the order, and (as this court pointed out), it might well have been held that, in the circumstances, the duty to warn the public had not yet arisen. But the jury thought otherwise, since they found that the defendants ought, if they exercised reasonable foresight and took reasonable measures, to have neutralized the danger before the date of the accident. The case, therefore, was a simple one, in which the defendants had erected and were maintaining an obstruction in the highway which, in the circumstances, was a danger to the public, and had not done what the jury said they could and ought to have done, viz., taken steps to neutralize the danger. The substantial argument for the defendants was that, when the guard was erected, it was reasonably safe, and that no further duty was imposed on them when, by order, the city lights were extinguished; *Great Central Ry. Co.* v. *Hewlett* (1) was particularly relied on. It was held that there was a continuing duty to keep the guards in a reasonably safe condition, and that this duty was not, in the circumstances, and in view of the jury's finding, abrogated by the Lighting Order. Pickford L.J. put the point concisely (2): "I think there was an obligation on the "defendants to take reasonable care to see that it [the guard] "was not a danger under the altered conditions." In answer to the argument that the decision would impose an obligation on local authorities to paint every post and kerb, he said: "But in truth it only imposes an obligation to take reasonable "care that what they have put in the roadway shall not become "a nuisance and a danger under altered conditions." This decision, and the reasoning on which it was based were, in my opinion, manifestly right and in accordance with the principles laid down in a number of cases. I respectfully do not agree with the view expressed in *Lyus* v. *Stepney Borough Council* (3), that the decision cannot stand with that of the House of Lords in *Great Central Ry. Co.* v. *Hewlett* (1).

The next case to be mentioned is *Sheppard* v. *Glossop Corporation* (4), decided in this court. The decision is important for present purposes, not because it is directly in point, but for

(1) [1916] 2 A. C. 511.
(2) [1917] 2 K. B. 866, 872.
(3) [1941] 1 K. B. 134, 152.
(4) [1921] 3 K. B. 132.

the reasoning upon which it was based and the distinctions which were drawn in the judgments. The place in question was one where (as in the present case) the local authority's position in the matter of street lighting was governed by s. 161 of the Public Health Act, 1875, i.e., they merely had the power to light at their discretion. They adopted the practice of extinguishing the street lamps about 9 p.m. The particular peril which led to the accident after the lamps were extinguished was not of the local authority's making, nor were they in any way responsible for it. On these facts the conclusion was clear that they were not liable: they could only have been held liable by treating their power to light the streets as being, in the circumstances, equivalent to a duty, which it obviously was not. But all three members of the court were careful to distinguish the case from those where the danger is created by the local authority itself. Thus Bankes L.J. (1) said: " and I think it " will be found that wherever a plaintiff has succeeded in " establishing a liability it has been not for merely omitting to " light a part of the district but for making it dangerous " unless it is sufficiently lighted." Scrutton L.J. observed (2): " It is clear that if they had placed in a highway an obstruction " which might cause damage in the dark to the public using the " highway, then they would be required either by lighting or " other proper warning to give notice of the obstruction." Again, he said (3): " It is left to their discretion to light or not " to light; therefore they need not light at all; if for a time " they light they may discontinue either wholly or partially " in point of time or in point of space, and the mere discontinuance is no breach of duty. That is, of course, subject " to this; that if they place an obstruction in the highway they " must by lighting or warning, or by watchmen or fences or " other reasonable means, guard against the danger they " have themselves created."

In speaking of the case of *Lamley* v. *East Retford Corporation* (4), where Lord Esher M.R., as reported, made some observations with which the court in *Sheppard* v. *Glossop Corporation* (3) disagreed, Scrutton L.J. said: " A post had " been placed in a public footway; it had been there for six " weeks; no warning was given of its presence, and a man in " the dark lawfully using the footway came into collision with

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(1) [1921] 3 K. B. 132, 140.
(2) Ibid. 144.
(3) Ibid 145, 146, 148, 149, 150, 151.
(4) (1891) 55 J. P. 133.

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" it and was injured. That was amply sufficient ground for the " decision." As to *Great Central Ry. Co.* v. *Hewlett* (1) he observed that it decided " no more than this, that where the " legislature expressly authorizes the existence of a particular " obstacle in a highway it does not impose any obligation to " light it." In summing up his views, he again said, that in cases governed by the Public Health Act, 1875, the local authority, although under no obligation to light the streets, would be liable for " negligence in putting posts in a highway " without warning, and negligence in placing traps and dangers " in the streets and not lighting them at night." Atkin L.J., after pointing out that in the case before him the local authority " did not cause the danger ; it was already in existence," said that " All the cases in which liability for not lighting has " been established against corporations regulated by " the Public Health Act, 1875 " can be explained upon the footing " that the corporation in question created the danger by " which the plaintiff was injured." These observations as to the existence of liability in cases where the local authority has itself created the danger are, of course, dicta. But not only are they weighty in themselves, but, in my respectful opinion, they embody a correct statement of the law and are based on an accurate view of the previous authorities both in the House of Lords and in this court.

I will now turn to a consideration of the recent cases. In *Greenwood* v. *Central Service Co.* (2), the plaintiff, a passenger in a taxicab, was injured when the cab collided with an unlighted street refuge in the black-out. The accident took place in Goodge Street where (as was the case in *Great Central Ry. Co.* v. *Hewlett* (1), street lighting is compulsory under s. 130 of the Metropolis Management Act, 1855. This duty was suspended, and street lighting was prohibited by para. 1 of the Lighting (Restrictions) Order, 1939, which, however (as in *Hewlett's* case (1)) permitted the use of lights up to a specified maximum candle power for the purpose of indicating obstructions upon or near the carriageway of any road. It is clear, therefore, that if there was a duty on the local authority to take reasonable steps to warn the public, the lighting restrictions did nothing to prevent their carrying out that duty by placing a suitable lamp upon the refuge. They had in fact placed a hurricane lamp upon it, but at the time of the accident it had gone out. It is important to have the facts

(1) [1916] 2 A. C. 511.

(2) [1940] 2 K. B. 447.

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in mind. The duty, if it existed, was not an absolute duty to maintain a warning system (by lamps or otherwise) but only a duty to take reasonable steps to prevent danger to the public. The local authority had an elaborate system of patrolling the streets with a lorry for the purpose of replacing any lamps which (as they knew was liable to happen) might have gone out, and they had officers on duty attending the extinguished lights. The county court judge held that the authority had employed reasonable means to keep the lights going, and this finding of fact was sufficient to dispose of the case, since it negatived the proposition that the authority had failed to take reasonable steps to warn the public. The argument for the injured passenger followed a different line. It was said that the Metropolis Management Act imposed a duty to light the streets, and that in normal times the performance of that duty made it unnecessary to put a special light upon the refuge. It was then said that the Lighting (Restrictions) Order, by empowering the authority to place a warning lamp on the refuge, did to that extent leave the compulsory lighting provisions of the Metropolis Management Act unaffected, and that in failing to exercise that power the authority committed a breach of the duty imposed upon it by the Act. My brother MacKinnon dealt with this argument by holding that any duty imposed by s. 130 of the Metropolis Management Act disappeared when the Lighting (Restriction) Order was issued. He also held that, assuming that the local authority was bound to use reasonable diligence to render the obstacle safe and innocuous, the finding of fact of the county court judge was conclusive. Luxmoore L.J. agreed that the finding of the county court judge was conclusive on the issue of negligence. He also agreed with MacKinnon L.J. that there was no absolute duty to light the refuge. Tucker J. concurred. If I may respectfully say so, I find myself in complete agreement with these conclusions, which in no way affect the present question.

The next case is *Wodehouse* v. *Levy* (1). That was an appeal from a judgment of Cassels J. (2), and was in some respects a similar case to that of *Greenwood* v. *Central Service Co.* (3). Cassels J. held that, notwithstanding the Lighting (Restrictions) Order, the absolute duty of lighting the streets imposed by the Metropolis Management Act remained to the extent permitted by the order. This part of his judgment was overruled by

(1) [1940] 2 K. B. 561.
(2) Ibid. 298.
(3) Ibid. 447.

this court in *Greenwood* v. *Central Service Co.* (1). He also held, however, that the local authority had been guilty of a breach of duty at common law " in failing on the night in " question to light this obstruction on the road (2)." He appears to have regarded the common law duty which he postulated as being an absolute duty, since he did not discuss the question whether the local authority had taken reasonable steps to make the shelter safe. The authority had pleaded that they " had " placed on the refuge such lights as were allowed by law, but " that they had been extinguished or removed or stolen through " no fault of theirs " (2). This allegation, if established, would clearly have been sufficient to support a finding that reasonable care had been exercised. When the case came before this court, the first of the above findings by Cassels J. was necessarily reversed. But, in dealing with the second finding, the court negatived the existence of any common law duty to take care. My brother MacKinnon, who had said (by way of dictum) in *Greenwood* v. *Central Service Co.* (1), that there was a common law obligation on the local authority to use reasonable care to prevent the obstruction from being a danger to persons using the highway, pointed out that this was dictum only, and said that, having reconsidered the point, he was of opinion that it was wrong. His reasoning is contained in the following passage (3): " It was wrong because, as it seems to me, the " right of the borough council to erect this obstacle in the " highway is given them by the Metropolis Management Act, " 1855, s. 108. They are given the right to put the refuge " in the middle of the highway; and, if there is any obligation " to light it, that also must be discovered from some statute. " In normal times of peace that obligation exists under s. 130 " of the same Act; but, as has been pointed out, s. 130 has " now been temporarily repealed. In the absence of any " provision similar to s. 130, inasmuch as the council are given " by statute the right to erect the obstruction in the highway, " there is no statutory and no common law duty to light it. " That that is so is shown by two cases. The first is *Great* " *Central Ry. Co.* v. *Hewlett* (4), and the second is the judgment " of Bankes L.J. in *Baldock* v. *Westminster City Council* (5)."

With the utmost respect, I cannot agree with this. The proposition that " they are given the right to put the refuge

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(1) [1940] 2 K. B. 447.
(2) Ibid. 298, 304.
(3) Ibid. 564.
(4) [1916] 2 A. C. 511.
(5) 88 L. J. (K. B.) 502; 120 L. T. 470.

"in the middle of the highway; and, if there is any obligation "to light it, that also must be discovered from some statute" appears to me, with all respect, to run counter to the authorities relating to the duty to take care in the exercise of statutory powers. He relied on *Great Central Ry. Co.* v. *Hewlett* (1), and the judgment of Bankes L.J. in *Baldock* v. *Westminster City Council* (2) in support of his proposition. My reasons for thinking that *Hewlett's* case (1) does not support the proposition appear from what I have already said in discussing that decision. I find no support for it in the judgment in *Baldock's* case (2), to which I shall refer in a later part of this judgment. My brother went on to say that, assuming a duty to have existed, he could not make out that there was any lack of reasonable care on the part of the borough council. If this had formed the basis of his judgment it would, of course, have put it on all fours with the decision in *Greenwood* v. *Central Service Co.* (3). I do not see how the fact that the obligations to light the streets and the power to erect the refuge are found in the same Act had any bearing on the question: they are two distinct subject-matters, and the duty to light does not condition or affect the power to erect. The suggested connexion arises, I think, from regarding the duty whose existence is in question as a duty to light. In truth, as I have already said, it is not—it is a duty to take care. Lighting may or may not be the appropriate or most suitable method of exercising the necessary care. It cannot be the only one since, as I have said, the duty arises in the daytime as well as during darkness, and even if all lighting (including the use of warning lights) were to be prohibited, it would not necessarily follow that the undertakers responsible for an obstruction would be entitled to do nothing. If there was a useful, but only partly effective, method of warning the public of the danger, e.g., by the use of white paint, the undertakers would, as it seems to me, be under a duty to make use of it if the duty to take care exists. Whether or not failure to do so would amount to negligence would be a question for the jury. This may be illustrated by the case of obstructions on the pavement, such as sand-bins. If the view were taken by a tribunal of fact (and I could well understand it) that it would be unreasonable to expect a local authority to light every obstruction on the footpath, this would not

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(1) [1916] 2 A. C. 511.

(2) 88 L. J. (K. B.) 502; 120 L. T. 470.

(3) [1940] 2 K. B. 447.

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necessarily justify inaction. A jury might well—and probably would—hold that it was negligent not to do what was possible by, e.g., the use of white paint. The lighting of obstructions in the roadway and the use of white paint upon obstructions on the pavement are the means by which local authorities have in practice interpreted their obligations to the public. It is sometimes surprising to the lawyer to find how often the practice of reasonably-minded men marches in conformity with their legal obligations.

But I must return to *Wodehouse* v. *Levy* (1). Luxmoore L.J. was also of opinion that to hold that there was a common law obligation to light the obstruction in question would be contrary to the decisions in *Great Central Ry. Co.* v. *Hewlett* (2) and *Baldock* v. *Westminster City Council* (3), and that if certain observations of Scott L.J. in an earlier case in this court (*Polkinghorn* v. *Lambeth Borough Council* (4)), meant that there was such a duty he (Luxmoore L.J.) would be unable to follow them. He said that *Polkinghorn's* case (4) was justified by the fact that there the borough council "had become subject to a "self-imposed duty to illuminate the obstruction, in the same "way as the Westminster City Council had become liable in "the *Baldock* case (3)." *Polkinghorn* v. *Lambeth Borough Council* (4) was not a war-time case and compulsory street lighting under s. 130 of the Metropolis Management Act, 1885, was in full force. The plaintiff's car ran into a street refuge which normally carried a warning light, but the light was for some unexplained reason not working at the time of the accident. There does not appear to have been any evidence as to the length of time which had elapsed since its extinction. Slesser L.J. did not refer in his judgment to s. 130, and he does not appear to have placed any reliance upon it. He said that the defendants, having used their statutory power to place the refuge in the roadway, were bound to exercise reasonable care to prevent injury to others. They had failed in their obligation, and there was no explanation to excuse their non-performance of it. Scott L.J. said that it was the duty of the defendants, under their statutory obligation to light the street, to see that the refuge was efficiently lit. He added that whether the case was regarded from the point of view of statutory duty or from that of common law duty, the failure to maintain the light

(1) [1940] 2 K. B. 561, 567.
(2) [1916] 2 A. C. 511.
(3) 88 L. J. (K. B.) 502; 120 L. T. 470.
(4) (1938) 158 L. T. 127.

was all that it was necessary for the plaintiff to prove unless the defendants gave evidence to displace the onus by showing that they had been guilty of no fault. The case, he thought, was a simple one and, prima facie, was a case of negligence and breach of statutory duty, no answer being attempted to displace that onus. Farwell J. preferred to deal with the case as one of negligence and he expressed no opinion as to statutory duty. He held that the onus lay on the defendants to show that the extinction of the light was not due to any negligence of theirs.

All three members of the court, therefore, held that the case should be decided on the ground of negligence: only Scott L.J. thought that it could also be rested on breach of the statutory obligation to light the streets. In *Wodehouse* v. *Levy* (1), Luxmoore L.J. treated the view that the case was one of negligence as being that of Scott L.J. alone: but with all respect this was not so. Nor do I think that Luxmoore L.J. was entitled to regard *Polkinghorn* v. *Lambeth Borough Council* (2) as justified on the principle of a trap enunciated in *Baldock* v. *Westminster City Council* (3) (as to which see below). No member of the court in *Polkinghorn's* case (2) relied on any such principle. I must also respectfully disagree with the further opinion of Luxmoore L.J. that, if *Polkinghorn's* case (2) meant that there was a common law duty, it was contrary to the decisions in *Great Central Ry. Co.* v. *Hewlett* (4) and *Baldock* v. *Westminster City Council* (3). In the later case of *Lyus* v. *Stepney Borough Council* (5), to which I am about to refer, Scott L.J. was a member of the court. *Polkinghorn* v. *Lambeth Borough Council* (2) was not referred to.

I feel bound to point out that if the view expressed in *Wodehouse* v. *Levy* (6) were correct, and local authorities in the Metropolitan area had acted upon it (which happily they did not), the streets of London would have been littered with smashed vehicles and the bodies of their occupants. Moreover, the argument is quite inapplicable in a case (such as the present) lying outside the area of compulsory street lighting. Is it to be said that if a local authority outside that area chooses not to exercise the permissive power of lighting its streets it is entitled to leave street refuges unlit? If so, it would be sheer murder. If, on the other hand, the local authority in such a case is under a duty to take reasonable precautions and lighting the refuges is the only reasonable precaution to take, what becomes of the argument that there can be no duty to light them unless the statute imposes it? It would appear that the distinction between the Metropolitan area, where street lighting is compulsory, and other areas where it is optional cannot have been present to the mind of the court: and it is most unfortunate that *Morrison* v. *Sheffield Corporation* (1) was not cited. Goddard L.J. (as he then was) the third member of the court in *Wodehouse* v. *Levy* (2), agreed. He said that: "Parliament having authorized the local authority to put a "refuge in the street and not having imposed upon the "authority the duty of putting a light on the obstruction itself, "it follows that the local authority are committing no breach "of statutory duty if they put a refuge in the street and do "not put a light on that refuge." He, therefore, like MacKinnon L.J., was taking the view that no duty could exist unless it were imposed by the statute. He went on to say: "But that in no way lessens the obligation of the borough "council or other local authority to provide an adequate system "of street lighting, and the system would not be adequate if "it did not cause a reflection or light to show the position of "obstructions in the streets." And he concluded by saying: "I can find no duty on the council after that regulation [scilicet, "the Lighting (Restrictions) Order] came into force under "which they were bound to light the obstruction because, as my "Lords have pointed out, the provision in para. 4 of the order "that the order shall not apply to a certain class of lights is only "permissive; it takes out of the prohibition, and allows "certain lights to be maintained, which otherwise would be an "offence, but it does not seem to me to increase the authority's "obligation in any way. I can find no obligation in this case "to light a refuge apart from the general obligation to provide "an adequate system of street lighting. That became illegal "and it follows that the council committed no breach of their "duty and the appeal should be allowed." He, therefore, like the other two members of the court, is finding in the statutory obligation to light the streets the limit of the local authority's duty in respect of giving to the public warning of the existence of the refuge. There is another difficulty raised by this decision. Suppose that in peace-time, by interruption of the supply in a Metropolitan area, the lighting were to fail and remain out of action for several days. The local authority would clearly be under no liability if a collision with a shelter took place before it had a reasonable opportunity of lighting it. But could it leave the shelter without a warning light after such a reasonable opportunity had arisen? A local authority would indeed be callous if it took so limited a view of its obligations to the public.

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(1) [1940] 2 K. B. 561, 567.
(2) 158 L. T. 127.
(3) 88 L. J. (K. B.) 502; 120 L. T. 470.
(4) [1916] 2 A. C. 511.
(5) [1941] 1 K. B. 134.
(6) [1940] 2 K. B. 561, 568, 569.

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(1) [1917] 2 K. B. 866.

(2) [1940] 2 K. B. 561, 568, 569.

The next case was that of *Lyus* v. *Stepney Borough Council* (1), decided at first instance by Humphreys J. In that case during the black-out the plaintiff, a pedestrian, was injured by colliding with a sand-bin placed by the defendants on the footpath under their statutory powers. No warning was given to the public, either by lighting or whitening the sand-bin or otherwise rendering it visible to the public. Humphreys J. decided in favour of the plaintiff. He quoted the statement of general principle enunciated by Lord Parker in *Great Central Ry. Co.* v. *Hewlett* (2), which I have already set out. He pointed out that when the sand-bin was erected in 1936 it was unnecessary for the local authority to take any new precaution to show where it was, since they were performing their statutory duty of lighting the streets. The coming into force of the Lighting (Restrictions) Order did not, in his view, absolve them from their duty to take reasonable precautions, which he thought would have been fulfilled by painting the sand-bin white. This, in my opinion, was correct. Humphreys J. regarded the obligation to light the streets, not as the limit of the local authority's duty in respect of making the sand-bin conspicuous, but as something, which, so long as it was performed, made it unnecessary to take any special steps to perform that duty. Once the street lighting was suppressed, the duty called for the taking of such special steps—not necessarily by lighting the sand-bin. This reasoning is in exact accordance with my own view. Humphreys J. then dealt with the decision of this court in *Wodehouse* v. *Levy* (3). He referred to the passage in the judgment of Goddard L.J. first quoted above, and said that everyone agreed that the local authority are committing no breach of statutory duty in not lighting the obstruction "so "long as the street itself is lighted" (4). He went on to point out that the question of some alternative means of warning, such as white paint, was not considered. Here, again, I think that Humphreys J. was right in thinking that the duty is a duty

(1) [1940] 2 K. B. 662.
(2) [1916] 2 A. C. 511, 519.
(3) [1940] 2 K. B. 561.
(4) [1940] 2 K. B. 662, 665, 667.

to take care and not specifically a duty to light. He considered that the case before him was covered by the decision of this court in *Morrison* v. *Sheffield Corporation* (1), and stated his own view in the following words: "The mere fact that a corporation are "absolved from the duty of lighting the streets does not "absolve them from the duty, which the common law imposes "on them, to see that persons using the highway are not unduly "inconvenienced or injured by any carelessness on the part "of the authority." I agree with this. The rest of the judgment deals with the facts. On appeal to this court the decision was reversed (2). The court consisted of my brethren Scott, MacKinnon and Luxmoore L.JJ., and the judgment of the court was delivered by Luxmoore L.J. In the judgment it was pointed out that *Morrison* v. *Sheffield Corporation* (1) was not cited either in *Greenwood* v. *Central Service Co.* (3) or in *Wodehouse* v. *Levy* (4), and the court addressed itself to the question whether the two latter cases were consistent with *Morrison's* case (1). It examined the decision of the House of Lords in *Great Central Ry. Co.* v. *Hewlett* (5) at length and found in that decision a basis for distinguishing *Morrison's* case (1). That basis apparently was that the local authority had two statutory powers, the first to erect the sand-bin, and the second to maintain it. This, with all respect, appears to me to disregard the essential fact which governed the decision in *Hewlett's* case (5), viz., that the statute merely authorized the maintenance of a post *already in existence*. The view that undertakers having power to erect and maintain an obstruction in the highway can say, once they have erected it, that while thereafter maintaining it they are not engaging in "any "active operation" and therefore cannot be said to be in breach of a duty to take precautions, appears to me to lead to most remarkable consequences. *Great Central Ry. Co.* v. *Hewlett* (5) is far from laying down any such proposition and it was in fact negatived in *Morrison* v. *Sheffield Corporation* (1) The court said (6) that it was "not easy to understand some "passages in the various judgments" in *Morrison* v. *Sheffield Corporation* (1), which, I venture to think, is only true if the reasoning in *Wodehouse* v. *Levy* (4) is assumed to be correct. But that is the very point: and, again with the utmost respect, I cannot think that it was legitimate, as the judgment proceeds

(1) [1917] 2 K. B. 866.
(2) [1941] 1 K. B. 134.
(3) [1940] 2 K. B. 447.
(4) [1940] 2 K. B. 561.
(5) [1916] 2 A. C. 511.
(6) [1941] 1 K. B. 134, 151, 152.

to do, to explain away these passages by assuming that they were based "on the fact that the guards with spikes, which "were reasonably safe while street lighting was maintained, "were not, by reason of the existence of the spikes, guards "authorized by the statute." I cannot find any suggestion in the judgments in *Morrison* v. *Sheffield Corporation* (1) that such a view was taken by the court. Nor do I think that any such view ought to be read into the judgment by reason of observations by Scrutton L.J. in *Sheppard* v. *Glossop Corporation* (2), observations which, moreover, in my humble judgment, do not carry the meaning imputed to them. The judgment then proceeded to say (3): "If, however, *Morrison* "v. *Sheffield Corporation* (1) is not properly distinguishable "from the other cases on the grounds suggested and is in "conflict with them, we think that this court is bound in this "case, as it was in *Greenwood* v. *Central Service Co.* (4), and in "*Wodehouse* v. *Levy* (5), to follow the decision of the House of "Lords in *Great Central Ry. Co.* v. *Hewlett* (6)." After most careful and respectful consideration, I find myself forced to the conclusions (i.) that in *Lyus* v. *Stepney Borough Council* (7) this court was wrong in thinking that *Wodehouse* v. *Levy* (5) was not in conflict with *Morrison* v. *Sheffield Corporation* (1); (ii.) that it was wrong in thinking that it was bound by *Great Central Ry. Co.* v. *Hewlett* (6) to decide *Wodehouse* v. *Levy* (5) and *Lyus* v. *Stepney Borough Council* (7) as it did. *Greenwood* v. *Central Service Co.* (4) is not concerned in the controversy as it was decided on a matter of fact.

The next case is *Fox* v. *Newcastle-upon-Tyne Corporation* (8). This case is admittedly indistinguishable from the present case, save that the accident took place on the evening of the day when the shelter was finished, a distinction which is of no importance in view of the fact that the county court judge found the corporation to have been negligent in not lighting the shelter. The decision, if we are compelled to follow it, is decisive of the present case and it negatives a suggested distinction between the present case and *Wodehouse* v. *Levy* (5) and *Lyus* v. *Stepney Borough Council* (7), namely, that in those two cases the obstruction was erected before, while in *Fox* v. *Newcastle-upon-Tyne Corporation* (8) and the present case it was erected after the Lighting (Restrictions) Order came into force. Quite apart from the decision in *Fox's* case (1), such a distinction appears to me to be incapable of support. I see no principle which could justify it and it would lead to the most remarkable results. A motorist who was prudent enough to select as his objective a shelter erected after the restrictions came into force could recover, while his less prudent brother could not. The spectacle of a local authority carefully lighting the one set of shelters and refraining from lighting the other (as on the argument it would be entitled to do) would not be an edifying one, and here again it is fortunate that local authorities have taken a stricter view of their obligations to the public. The distinction was, however, relied on in argument. My brother MacKinnon L.J. reaffirmed his opinion as to the correctness of the decisions in *Wodehouse* v. *Levy* (2) and *Lyus* v. *Stepney Borough Council* (3), and rejected the suggested distinction based on the date of erection, saying (4): "I cannot think "that that distinction can make any difference and if it were "so it would have startling consequences"—an observation with which I respectfully agree. Luxmoore L.J. agreed with this view. My brother du Parcq L.J. dissented. He thought (5) that the case was concluded by the county court judge's finding of fact that: "The shelter had, for the reasonable safety of "the public, to be painted . . . . when completed; it had "been completed; it had not been painted owing to the bad "weather, and this seems to me to be an occasion when any "reasonable official of the corporation in charge of the erection "would have thought it, not only proper and advisable, but "essential, that the power to light allowed under the Lighting "(Restrictions) Order should be exercised, especially as this "obstruction had been erected in a street of some "importance" (6). du Parcq L.J. referred to *Geddis* v. *Proprietors of Bann Reservoir* (7), and thought that it was applicable to the facts of the case before him. He also referred to the distinction between authority given in general terms and authority to do a precise thing, and considered that *Great Central Ry. Co.* v. *Hewlett* (8) was an example of the latter. In the case before him he thought that Parliament in saying: "You may construct an air-raid shelter" was saying it in general terms, and that it was: "reasonable to infer that the

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(1) [1917] 2 K. B. 866.
(2) [1921] 3 K. B. 132.
(3) [1941] 1 K. B. 134, 152.
(4) [1940] 2 K. B. 447.
(5) [1940] 2 K. B. 561.
(6) [1916] 2 A. C. 511.
(7) [1941] 1 K. B. 134.
(8) [1941] 2 K. B. 120.

(1) [1941] 2 K. B. 120.
(2) [1940] 2 K. B. 561.
(3) [1941] 1 K. B. 134.
(4) [1941] 2 K. B. 124.
(5) Ibid. 127.
(6) [1941] 2 K. B. 120, 127.
(7) 3 App. Cas. 430.
(8) [1916] 2 A. C. 511.

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" legislature meant the undertakers to exercise their authority " with reasonable care." But my brother du Parcq was confronted with the decisions in *Wodehouse* v. *Levy* (1) and *Lyus* v. *Stepney Borough Council* (2), the correctness of which he felt constrained to accept. While respectfully agreeing with his reasoning down to this point, I find it impossible to accept the distinction which he draws, if I rightly understand it. The gist of the decision in the two earlier cases he finds to be that the obstructions had been erected when there were no lighting restrictions and that the local authorities did not come under a new duty, either by statute or at common law, when those restrictions came into force ; in the conditions prevailing at the time of their erection the obstructions had been put up with all reasonable care. In the case before him, however, he thought that Parliament, in authorizing the erection of an " air-raid shelter on a highway " must have intended " that a building should be erected which could safely " be used as an air-raid shelter and which would not cause any " unnecessary danger to the King's subjects when they were " using the highway " (3) : and he approved the view taken by the county court judge that " if a shelter is being constructed " on a highway, which must go on existing during a time when " there will be no light . . . . it is a mere matter of reasonable " common sense . . . . that it must be made as visible as " possible." (3) The reasoning so far appears to be based on the fact that what Parliament had authorized was the construction of an " air-raid shelter." If I am right in so thinking I do not find myself able to extract such a particular force from the expression. But my brother's final view is to be found where he says (4) :—" I should not myself have been alarmed by the " consequences which my Lord has pointed out might follow, " that the town clerk and the surveyor would be in a difficulty " because they might have to light some obstructions and not " others. The point I am endeavouring to make is that you " must look at the date when the building is constructed. " If, when the building is being constructed or has just been " constructed, it is found that in the then existing circumstances there has been some failure to do what any reasonable " person would have known he ought to do, then in my view the " undertakers can be held liable ; and I cannot see that this " places any greater burden upon a local authority than the

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(1) [1940] 2 K. B. 561.
(2) [1941] 1 K. B. 134.
(3) [1941] 2 K. B. 120, 131, 132.
(4) Ibid. 134.

"burden of showing reasonable intelligence, which I am sure is "not more than one ought to be entitled to demand from them."

This appears to draw the distinction, referred to above, between shelters erected before and those erected after the lighting regulations came into force, unless, indeed, it be meant that an air-raid shelter must in its very nature, whenever it is erected, be intended to exist during a black-out which everyone would suppose would be in force when the shelter came to be used. But the true view, in my opinion, is that the date of the erection of an obstruction and the purposes for which it is intended to be used are (apart from some special circumstances or some special language in the statute) both immaterial; that the duty to take reasonable care to prevent danger to the public is present throughout: that so long as the streets are properly lit the duty is ipso facto performed: but that when the street lighting is suspended, either as the result of lighting restrictions, or (in cases where street lighting is optional) as the result of the local authority's decision to extinguish the street lamps, or as the result of a breakdown in the lighting system, it becomes the duty of the local authority to take such steps to safeguard the public by special danger lights or otherwise, as in the circumstances of the case are reasonably possible. This, in my opinion, is the effect of the decision in *Morrison* v. *Sheffield Corporation* (1); it was the clear and unanimous opinion of this court in *Sheppard* v. *Glossop Corporation* (2), and correctly applies the principles laid down in many authorities in the House of Lords. The court in *Fox* v. *Newcastle-upon-Tyne Corporation* (3) does not appear to have had present to its mind the distinction between the Metropolis and other parts of the country where (apart possibly from some private Act) lighting is not compulsory. It appears to have been assumed that street lighting was in normal times compulsory in Newcastle-upon-Tyne, and, indeed, Mr. Berryman, in his argument refers to "the previously existing obligation of the "local authority to keep streets lighted." No private Act imposing this obligation in Newcastle-upon-Tyne was referred to and the case in this respect was treated as being on all fours with *Wodehouse* v. *Levy* (4) and *Lyus* v. *Stepney Borough Council* (5), which, in the absence of such an Act, it was not.

The last case is *Foster* v. *Gillingham Corporation* (6), also

(1) [1917] 2 K. B. 866.
(2) [1921] 3 K. B. 132.
(3) [1941] 2 K. B. 120, 121.
(4) [1940] 2 K. B. 561.
(5) [1941] 1 K. B. 134.
(6) 111 L. J. (K. B.) 364.

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in this court. The court consisted of MacKinnon L.J. Goddard L.J. and myself. The defendant corporation had erected a barrier across the highway near a bomb crater. It provided hurricane lamps which, on the night in question, had been blown out by wind. An employee, whose duty it was to attend to the lights, failed to visit them on that night. The plaintiff, when riding his bicycle in the dark, collided with the barrier and was injured. The county court judge held that the defendants were liable, their employee having failed in his duty. MacKinnon L.J. thought the case a clear one, falling within the well-known decision in *Penny* v. *Wimbledon Urban Council* (1). He distinguished *Wodehouse* v. *Levy* (2), and *Fox* v. *Newcastle-upon-Tyne Corporation* (3), saying : " There " is an essential difference between those cases and the present " one. In each of those cases the authority concerned was " empowered by statute to erect the specific obstruction in " question. In each of those cases the authority was given " direct statutory authority to erect an obstacle in the highway. " The question involved was whether, having such statutory " authority to erect the particular obstacle, they were under a " duty to light it after dark. I thought, and still think, they " were not, and that chiefly because of the decision of the " House of Lords in *Great Central Ry. Co.* v. *Hewlett* (4). In the " present case the defendants put an obstruction on the highway " without having in any sense the authority of Parliament to " put it there. That seems to me to be the essential difference " between this case and *Hewlett's* case (4), and as a consequence, " between this case and the cases I have referred to." Goddard L.J. with whose judgment I expressed my agreement, said that although it was stated that the council was acting under statutory powers, the court had not been told on what statute reliance was placed. He thought, however, that the alleged statutory power was to be found in s. 83 of The Towns Improvement Clauses Act, 1847. " Had this accident " happened before the war," he said, " no one would have " thought of contending that it was not the duty of the council " to light this barrier, and, as their duties are unaffected by the " Lighting Regulations and Orders, it follows that the only " question is whether they were guilty of negligence in this " respect." (5) While expressing the opinion already referred to

(1) [1899] 2 Q. B. 72.
(2) [1940] 2 K. B. 561.
(3) [1941] 2 K. B. 120.
(4) [1916] 2 A. C. 511.
(5) 111 L. J. (K. B.) 364, 366.

as to the desirability of a further consideration of the recent cases, he thought it unnecessary to deal with them as the case was of a class familiar before the war. It will be noticed that the majority of the court thought that the council had acted under statutory powers and, accordingly, that the distinction drawn by MacKinnon L.J. between that case and *Wodehouse* v. *Levy* (1) and *Fox* v. *Newcastle-upon-Tyne Corporation* (2) did not exist. I thought at the time, as did Goddard L.J., that the case before us could, in spite of the absence of that distinction, be differentiated from *Wodehouse's* case (1) and *Fox's* case (2). Having had the advantage of a fuller argument in the present case, I have come to the conclusion that I was wrong in so thinking. The result is that *Foster* v. *Gillingham Corporation* (3) is, in my view, inconsistent with those cases. It was suggested to us that Goddard L.J. and I were wrong in thinking that the Towns Improvement Clauses Act applied, and that the council was in fact exercising a common law power vested in it as the highway authority. This may be so. But it does not alter the fact that our decision was based on the view that the power exercised was a statutory one. In any case, I think that the suggested distinction between a statutory power and a common law power does not exist where all that the statute does is to authorize in general terms the construction of an obstacle on the highway which will be a danger to the public unless precautions are taken. To repeat what I ventured to say earlier in this judgment, the undertakers in each case, by exercising a power, in the one case statutory, and in the other at common law, place themselves in a relationship to the public which from its very nature imports a duty to take care. I prefer this way of putting it to saying that a duty to take care is implied in the statute—I do not much like the idea of implying duties which the legislature could have imposed by express language. The result, however, appears to be the same, and the question is, on the view that I favour: Has the legislature on the true construction of the statute manifested an intention that the relationship created should not import a duty to take care? and, on the other view: Does the statute on its true construction negative the existence of an implied duty?

I may conclude my examination of these cases by adding a few words as to the suggested distinction between the power to erect and the power to maintain. It would be a curious

(1) [1940] 2 K. B. 561.
(2) [1941] 2 K. B. 120.
(3) 111 L. J. (K. B.) 364, 366.

result if the undertakers, while constructing the obstacle, were under a duty to take care by lighting or otherwise in respect of a stack of bricks left in the highway and were absolved from any such duty when the bricks had been assembled in the form of a completed shelter. Yet this would apparently be the result if the undertakers could say that in "maintaining" the shelter they were in fact performing no positive act.

An alternative argument was put forward on behalf of the appellant to the effect that the defendants had taken upon themselves a duty towards the plaintiff in that they had adopted the practice of lighting shelters in their area; and reliance was placed on *Baldock* v. *Westminster City Council* (1), a decision of this court. This case, as I have already said, was relied on by both MacKinnon L.J. and Luxmoore L.J. in *Wodehouse* v. *Levy* (2), and linked with *Great Central Ry. Co.* v. *Hewlett* (3) as authority for the proposition that there was no statutory or common law duty to light the shelter. The accident in *Baldock's* case took place in the Metropolitan area during the currency of the lighting restrictions in the last war. A taxicab ran into an unlighted street refuge, the lighting of which was erratic owing to the difficulty of maintaining pressure. The jury found that the accident was due to negligence on the part of the defendants in omitting to maintain a danger lamp on the refuge, but that there was no conclusive evidence to show what caused the lamp to go out on that particular occasion. On these findings the deputy county court judge entered judgment for the defendants, holding that there was no evidence upon which the jury could find negligence. The Divisional Court (Lush and Bailhache JJ.), held that there was evidence that the lamps generally were liable to go out owing to low pressure and that there was need for guarding against that danger and that was a question of fact for the jury. They allowed the appeal. The duty they found to exist by reason of the fact that the defendants had recognized the existence of a duty to light the refuge and had accordingly "undertaken to perform it." On appeal to this court Bankes L.J. declined to express any opinion as to the right of the local authority to extinguish the lights on all their refuges but agreed with the view that they had taken a duty upon themselves. This he explained by treating the intermittent lighting of the refuge as in the nature of a trap because, as he said, "the public are allowed to believe that the shelters are

(1) 88 L. J. (K. B.) 502; 120 L. T. 470.

(2) [1940] 2 K. B. 561.

(3) [1916] 2 A. C. 511.

"lighted and to the knowledge of the local authority they are "sometimes lighted and sometimes not" (1). Warrington L.J. agreed. Scrutton L.J. referred to *Morrison's* case (2), the problem in which he said was very similar. He made no mention of a self-imposed duty or of a trap and held that the finding of the jury, being supported by evidence, was conclusive. In *Knight* v. *Sheffield Corporation* (3), Hilbery J. expressed the opinion that the view taken by Bankes L.J. was an application of a principle followed in several earlier cases, notably *Smith* v. *South Eastern Ry.* (4). Whether or not the evidence in *Baldock* v. *Westminster City Council* (1) was sufficient to justify the application of any such principle I need not inquire, nor is it necessary to express any view as to the suggested principle itself. In the present case, Macnaghten J. held that the argument based on *Baldock's* case (5) failed, since the evidence was insufficient to show that the plaintiff was the victim of a trap. I do not find it necessary to say whether in my opinion the view of Macnaghten J. as to the inapplicability of *Baldock's* case (5) was right. But I am bound respectfully to state my view that *Baldock's* case (5) is no authority for the proposition as to the absence of a duty to take care, for which it was cited in *Wodehouse* v. *Levy* (6). The question was not discussed, nor was any view with regard to it expressed either by Bankes L.J. or by Warrington L.J., while Scrutton L.J., by his reference to *Morrison* v. *Sheffield Corporation* (2), appears to me to have, by implication, answered the question in the way in which, in my humble judgment, it ought to be answered.

In the result, I am of opinion that the three cases, *Wodehouse* v. *Levy* (6), *Lyus* v. *Stepney Borough Council* (7), and *Fox* v. *Newcastle-upon-Tyne Corporation* (8), cannot be reconciled with *Morrison* v. *Sheffield Corporation* (2), nor indeed, with *Polkinghorn* v. *Lambeth Borough Council* (9), or *Foster* v. *Gillingham Corporation* (10), if my remarks upon these two cases are correct. In these circumstances, as I am entitled to select between the conflicting authorities in this court, I unhesitatingly prefer not to follow the three cases in question.

(1) 88 L. J. (K. B.) 502, 503; 120 L. T. 470, 472.

(2) [1917] 2 K. B. 866.

(3) 167 L. T. 203.

(4) [1896] 1 Q. B. 178.

(5) 88 L. J. (K. B.) 502; 120 L. T. 470.

(6) [1940] 2 K. B. 561.

(7) [1941] 1 K. B. 134.

(8) [1941] 2 K. B. 120.

(9) 158 L. T. 127.

(10) 111 L. J. (K. B.) 364.

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Since writing the above I have been reminded of the decision of the House of Lords in *East Suffolk Rivers Catchment Board* v. *Kent* (1). That was a case where the flooding was not caused, as in *Geddis* v. *Proprietors of Bann Reservoir* (2), by the exercise of a statutory power (namely, the power to construct a reservoir and to divert waters). As Viscount Simon L.C. said: "In the "present case the damage done by the flooding was not due to "the exercise of the appellants' statutory powers at all. "It was due to the forces of nature which the appellants, albeit "unskilfully, were endeavouring to counteract." In view of this the actual decision is not in point. But a clear distinction was drawn between the case then before the House and cases where the authority itself creates the danger. The Lord Chancellor said (3): "On the other hand, if the public body by "its unskilful intervention created new dangers or traps it "would be liable for its negligence to those who suffered "thereby," and he quoted with approval the observations of Scrutton L.J. in *Sheppard* v. *Glossop Corporation* (4) as to the liability for "negligence in putting posts in a highway "without warning; and negligence in placing traps and dangers "in the streets and not lighting them at night." Again, Lord Romer (3), said that in *Geddis* v. *Proprietors of Bann Reservoir* (2), the damage complained of "was damage that "he would not have sustained had the statutory authority "refrained from exercising its powers. It was damage "inflicted upon him by reason of the fact that the authority "did exercise its powers." He, too, approved of the distinction drawn in *Sheppard* v. *Glossop Corporation* (4) between dangers created by the local authority and dangers which they had not created. Lord Porter also approved of this distinction. As he said: "It is damage caused by negligently doing the act "authorized, not damage which is not prevented because the "act has not been done or has not been done efficiently or in "time which is under consideration."

I find in these observations strong support for the view which I have taken.

MacKinnon L.J. I have read with respectful admiration the elaborate judgment of the Master of the Rolls. If I express, as I do, my concurrence with his reasoning, and with the conclusion at which he has arrived, that is equivalent to saying,

(1) [1941] A. C. 74, 85.
(2) 3 App. Cas. 430.
(3) [1941] A. C. 74, 87, 99, 106.
(4) [1921] 3 K. B. 132.

in the circumstances, " Peccavi." I believe I have never allowed any false pride to make me hesitate in such an avowal when it has been necessary. Nor do I feel any consolation in reflecting that if I have erred I have done so in good company. The only passage in the judgment that has just been read that I do not find convincing is the attempt to explain the ratio decidendi of *Great Central Ry. Co.* v. *Hewlett* (1) in the House of Lords. The decision of that case in this court, in favour of the taxi driver, is not reported. But it is stated (2) that it was so decided upon the principle of *Geddis* v. *Proprietors of Bann Reservoir* (3)—that is, as enunciated by Lord Blackburn: " No action will lie for doing that which the legislature has " authorized, if it be done without negligence . . . . but it does " lie for doing that which the legislature has authorized if it be " done negligently." The legislature having authorized the railway company not only " to maintain " but also " to renew " and replace " the obstacle, I confess myself unable to understand the proposition that when it said " You may maintain " it did not authorize the company to do anything; but that when it said " You may renew and replace " it did authorize the company to do something, so that the principle of *Geddis* v. *Proprietors of Bann Reservoir* (3) became applicable, in favour of any subsequent taxi driver, when the company had repaired the effects of Hewlett's collision. I mention this not from any desire to renew the discussion, but only because I believe that the error to which, in company with several of my brethren, I have pleaded guilty, arose from our effort to give effect to the paramount decision of the House of Lords, as we tried to understand it, in *Hewlett's* case (1).

UTHWATT J. I agree with the judgment of the Master of the Rolls. The circumstance that the works were built and are kept standing in a highway in due exercise of statutory powers precludes liability on the ground of nuisance attaching to the undertakers responsible for their erection and maintenance. But user by virtue of a statute of the highway—for the place remains a highway—stands, in my view, in no different position from user finding its justification in a common law right. The common law duty owed to other users to take reasonable care in the use of the highway attaches, unless that duty is expressly or impliedly negatived by some statute. That, I

(1) [1916] 2 A. C. 511.
(2) Ibid. 514.
(3) 3 App. Cas. 430.

think, is clear on the cases. The fact that some authority is under a general duty to light the highway, or possesses a power so to do, if it be right to treat the existence of that power or duty merely as one of the facts in the case, is irrelevant to the existence of the undertakers' duty to take care. Performance of that duty or exercise of that power by the authority may, in practice, if properly carried out, relieve the undertakers of the necessity of taking any steps themselves to indicate the dangers arising from the obstruction for which they are responsible—the duty to take reasonable care not in this case demanding action on their part—and any sudden breakdown of the arrangements made by that authority is relevant on the question of fact whether reasonable care has in any particular circumstances been shown by the undertakers—the undertakers being entitled to take facts as they find them.

But it may well be that the existence of a power or duty to light in some authority ought not to be treated merely as one of the facts of the case, but ought to be treated as part of the general frame within which the powers given to the undertakers are to take effect when the statute conferring a power or imposing the duty is in operation at the date of the passing of the undertakers' statute. That is essentially a matter of construction of the statute governing the operations of the undertakers. Where a power is concerned, there appears to be no logical reason why, if treated as part of the general frame, the obligation of the undertakers to take due care should be affected. The power may or may not be exercised, or may be exercised only partially. Its existence, therefore, is no reason for reading into the statute an implied exemption from the duty to take care. Where there is a duty, the case is somewhat different. But a conclusion that the existence of the authority's duty to light absolves the undertakers from an obligation to take due care seems logically to involve that, as a matter of construction of the undertakers' statute, they are authorized to proceed on two assumptions, first, that the duty will be performed, and, second, that it will be performed in such a way that the lighting given in performance of that duty will properly protect other users of the highway, whatever works the undertakers may lawfully carry out in the exercise of their powers. That second assumption might well be contrary to reasonable expectation, when general powers are given to undertakers, or where lighting may not in all circumstances be the only precaution necessary to give effectual warning to other

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users of the highway. It is unnecessary in this case to pursue this question further, for one is here concerned only with the existence of a statute giving a power to light. I do not see, as a matter of construction of the undertakers' statute relevant here, that the existence of that power affected the duty of the undertakers to take due care.

Appeal allowed.

Solicitors for plaintiff: *Pattinson & Brewer.*

Solicitor for defendants: *C. W. Radcliffe, Clerk to the Middlesex County Council.*

J. W. H.

END OF VOL. AND OF KING'S BENCH SERIES FOR 1945.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1945, will be as follows :—

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CONVERSION — *Sale of goods under illegal contract—Machine tools—Maximum price fixed by order—Sale at price infringing order.*
BOWMAKERS, LD. *v.* BARNET INSTRUMENTS, LD. - - - - - - **C. A. 65**

CORONER'S INQUISITION — Committal — Power of trial judge to quash—Coroner's Act, 1887 (50 & 51 Vict., c. 71), s. 6. *See* REX *v.* REYNOLDS, sub tit. CRIMINAL LAW.

COSTS — *Taxation of costs — Order giving plaintiffs costs of action save that costs of issue of damages were to be the defendants' from date of payment into court—Mode of taxation—Division of items common to issue of damages and other issues.*
CINEMA PRESS, LD. *v.* PICTURES & PLEASURES, LD. - - - - **C. A. 356**

COUNTY COURT — *Practice — Claim for damages — No amount specified — Jurisdiction—Power to allow amendment restricting damages claimed to amount within county court jurisdiction—County Court Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 40, 42, 64—*County Court Rules*, 1936—*Or.* 7, *rr.* 1, 2—*Or.* 15, *rr.* 1, 6.
LEGON *v.* COUNT - - - **C. A. 391**

2. —— *Practice – Counter-claim — Nuisance—Title to hereditament not in question—Damages not exceeding* 20*l.—Ancillary injunction—Appeal without leave of judge—No right of appeal—County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105 (*a*).
BRETT *v.* THROWER - - - **C. A. 521**

CRIMINAL LAW — *Coroner's inquisition — Committal—Power of trial judge to quash—Coroner's Act*, 1887 (50 *&* 51 *Vict., c.* 71), *s.* 6.
REX *v.* REYNOLDS - **Lawrence J. 20**

2. —— *Obtaining credit by fraud—Incurring gaming debt—Debtors Act*, 1869 (32 *&* 33 *Vict., c.* 62), *s.* 13, *sub-s.* 1—*Winning valuable thing "in wagering"—Gaming Act*, 1845 (8 *&* 9 *Vict., c.* 109), *ss.* 17, 18.
REX *v.* LEON - - - **C. C. A. 136**

3. —— *Prevention of crimes — Charge — Found in public places, X. street and Y street, waiting for opportunity to commit an offence—X. street leading into Y. street Duplicity—Accused not embarrassed—Evidence of waiting for opportunity and then of offence attempted—Prevention of Crimes Act*, 1871 (34 *&* 35 *Vict., c.* 112), *s.* 7—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.
REX *v.* JOHNSON - - **C. C. A. 391**

4. —— *Carrying on business of dealing in securities without a licence—Inducing subscription to shares in company not yet in existence—"Securities"—Prevention of Fraud (Investments) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 16), *s.* 1, *sub-s.* 1 (*a*) ; *s.* 26, *sub-s.* 1.
REX *v.* HAMID - - - **C. C. A. 540**

5. —— *Trade Union — Illegal strike — "Acts in furtherance of" — Acts done before beginning of strike—Trade Disputes and Trade Unions Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 22), *s.* 1, *sub-s.* 2—*Practice—Indictment—Particulars—Count alleging "acts in furtherance of" an illegal strike.*
REX *v.* TEARSE AND OTHERS **C. C. A. 1**

DANGEROUS MACHINERY. *See* FACTORY ACTS.

DEFAMATION — *Slander — Reference given by plaintiff, a solicitor, to prospective tenant of defendant—Words spoken by defendant in regard to reference and in regard to solicitor—Whether words spoken in way of plaintiff's profession and in relation to his conduct therein, and therefore actionable per se.*
HOPWOOD *v.* MUIRSON - - **C. A. 313**

2. —— *Slander actionable per se—Limited liability company—Words calculated to injure reputation in relation to trade or business—Imputation of crime punishable corporally.*
D. & L. CATERERS, LD. *v.* D'AJOU **C. A. 364**

3. —— *Slander — Office of honour or credit—Occupation of firewatcher—A duty and not an office.*

Practice — Slander — Words not actionable without proof of special damage—Submission at close of plaintiff's case—Ruling postponed—Evidence called for defendant.
CLEGHORN *v.* SADLER **Croom-Johnson J. 325**

4. —— *Libel — Employer and employee — Industrial disease—Claim for compensation—Employer's insurers—Insurers' letter to proposed medical referee—Privilege—Malice of employers—Joint liability of insurers—Appointment of referee—Invalidity—Workmen's Compensation Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*f*), *sch. III.*, 12 *a*—*Regulations as to Medical Referees* (*St. R. & O.*, 1932, *No.* 960), *reg.* 25.
SMITH *v.* NATIONAL METER CO., LD. **Uthwatt J. 543**

DETINUE. *See* TROVER.

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EMERGENCY LEGISLATION — *Air-raid shelter erected on highway by local authority under statutory powers—Shelter unlighted—Collision of motorist with shelter—Duty of local authority.*
FISHER *v.* RUISLIP-NORTHWOOD U.D.C. AND MIDDLESEX C.C. - - - **C. A. 584**

2. —— *Conditions of employment—Rate of wages—Rate fixed by National Joint Council of the Building Trade—Underpayment—Workmen's claim for arrears—Right of action—Conditions of Employment and National Arbitration Order*, 1940 (*St. R. & O.*, 1940, *No.* 1305), *art.* 5, *para.* 1.
HULLAND *v.* WILLIAM SANDERS & SON **C. A. 78**

3. —— *Essential work — Scheduled undertaking—Termination of employment of specified person in undertaking—Alteration of character of work in undertaking—Essential Work (General Provisions) (No.* 2) *Order*, 1942 (*St. R. & O.*, 1942, *No.* 1594), *art.* 4 (1.) (*a*).
ADREMA, LD. *v.* JENKINSON **Divl. Ct. 446**

4. —— *Liabilities adjustment — Order allowing debtor to remain in possession of property—Order extending beyond end of*

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lease—Action for recovery of possession—Effect of protection order—Refusal of leave to proceed—Discretion—Liabilities (War-Time Adjustment) Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *ss.* 3, *sub-s.* 2; 6, *sub-s.* 1—*Liabilities (War-Time Adjustment) Act*, 1944 (7 *&* 8 *Geo.* 6, *c.* 40), *ss.* 6, *sub-s.* 1; 21.
In re Affairs of Alsop - - **C. A. 404**

5. —— *Pension — Fireman of mercantile marine—Aggravation of organic disease—Injury caused by hard work, with increased effort in combating the enemy—" War injury" —Injury attributable to conditions abnormal in time of peace—No peril other than such conditions—" War risk injury"—Pensions (Navy, Army, Air Force and Mercantile Marine) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 83,) *ss.* 3 *and* 10—*Pensions (Mercantile Marine) Act*, 1942 (5 *&* 6 *Geo.* 6, *c.* 26), *s.* 1, *sub-ss.* 1, 2, 3; *s.* 5.
In re Saffell - - **Tucker J. 259**

6. —— *Pension—Civil defence volunteer—War service injury—Personal Injuries (Emergency Provisions) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1—*Pensions (Mercantile Marine) Act*, 1942 (5 *&* 6 *Geo.* 6, *c.* 26), *s.* 5—*Personal Injuries (Civilians) Scheme*, 1944 (*St. R. & O.*, 1944, *No.* 369), *Part IV.*, *art.* 12, *para.* 2 (*a*).
Ex parte Haines - **Tucker J. 183**

7. —— *Requisition — Land — Contract for sale of land—Requisition before date of completion—Notice served on vendor in occupation —No actual possession by requisitioning authority—Ability of vendor to give vacant possession—Defence (General) Regulations.* 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 51,
James Macara, Ld. *v.* Barclay - **C. A. 148**

8. —— *Requisition — Land — Lease — Compensation—Storage of furniture—Disclaimer of lease by tenant—Liability of requisitioning authority for continuing storage charges—Compensation (Defence) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 75), *s.* 2, *sub-s.* 1 (*d*).
Looker *v.* Regem
Viscount Caldecote C.J. 39

9. —— *Requisition — Land — Power of competent authority to take possession—Willingness of owner to give possession by agreement—Whether power of competent authority restricted by provisions of Defence Act*, 1842 (5 *&* 6 *Vict.*, *c.* 94), *s.* 19—*Emergency Powers (Defence) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1, *sub-ss.* 1, 2 (*b*) (i), 4—*Defence (General) Regulations*, 1939 (*St. R. & O.*, 1939, *No.* 927), *reg.* 51 (*as amended*).
Ouardi Kavala, Ld. *v.* Grigg - **C. A. 323**

10. —— *War damage — Business scheme insurance—Account books — " Goods " — " Documents owned for the purposes of a " business"—War Damage Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 21), *s.* 83, *sub-s.* 1; *s.* 84, *sub-ss.* 1 *and* 4; *ss.* 85 *and* 134.
Hill *v.* Regem **Humphreys J. 329**

11. —— *War injury — Impact on property of bomb dropped from enemy aircraft—Bomb crater on railway track—Subsequent negligent order to engine driver to proceed—Fall of engine into crater—Death of engine-driver—Personal Injuries (Emergency Provisions) Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *ss.* 3 *and* 8 *sub-s.* 1.
Greenfield *v.* London and North Eastern Railway Co.- - - **C. A. 89**

12. —— *War injury — Death — Claim by dependent—Not within scheme made by Minister—Right of action—Personal Injuries (Emergency Provisions) Act*, 1939 (3 *&* 4 *Geo.* 6, *c.* 82), *s.* 3, *sub-s.* 1; *s.* 8, *sub-s.* 1.
Billings *v.* Reed - - - **C. A. 11**

ENEMY ALIEN—*Change of nationality in war-time—Decree of enemy government—Enemy alien rendered stateless — Internment —Writ of habeas corpus.*
Rex *v.* The Home Secretary. *Ex parte* L. and Another - - - **Divl. Ct. 7**

ESSENTIAL WORK. *See* Emergency Legislation.

EXECUTION (STAY OF). *See* Judgment.

FACTORY ACTS—*Dangerous Machinery—Fencing — Circular saw — Modification of Act by regulations—Binding effect of previous decision—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14, *sub-s.* 1; *s.* 60, *sub-ss.* 1, 2 (*c*); *s.* 159, *sub-s.* 1 — *Woodworking Machinery Regulations*, 1922 (*St. R. & O.*, 1922, *No.* 1106), *reg.* 10.
Nicholls *v.* F. Austin (Leyton), Ld.
C. A. 50

2. —— *Occupier — Manufacture of explosives—Explosion—Cause unknown—No negligence by occupier—Personal injury to person lawfully on premises—Liability.*
Read *v.* J. Lyons & Co., Ld. - **C. A. 216**

FOOD AND DRUGS — *Adulteration — Service of copy of certificate of analysis—" Any certificate "—Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 80, *sub-s.* 3.
Sherwood *v.* Cox - - **Divl. Ct. 549**

2. —— *Prosecution of " some other person " —Form of summons—Food and Drugs Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 83, *sub-s.* 3.
Atterton *v.* Browne - - **Divl. Ct. 122**

GAMING—*Football pool advertised in newspaper—Pool conducted by bookmaker on credit system—Prize competition " for forecasts of*

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"the result of a future event"—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 26 *sub-s.* 1.
BRETHERTON *v.* UNITED KINGDOM TOTALISATOR CO., LD. - - - **Divl. Ct. 555**

GAMING (FRAUD IN). *See* CRIMINAL LAW.

HUSBAND AND WIFE — *Justices' order for wife's maintenance—Payments duly made under order—Wife's common law right to pledge husband's credit for necessaries—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict., c.* 39), *ss.* 4 *and* 5 (*a*) *and* (*c*), *as amended by Summary Jurisdiction (Separation and Maintenance) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.
SANDILANDS *v.* CARUS - - **C. A. 270**

INJUNCTION — *Personal service — Theatrical performance — Restriction on service for other person—Damage from breach of contract to perform—No damage from breach of restriction.*
MARCO PRODUCTIONS, LD. *v.* PAGOLA
Hallett J. 111

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C. A. 43

INSURANCE (Marine)—*War risk—Warlike operation—Requisitioned vessel—Anchorage in unusual naval base to discharge cargo—Stranding at night on hidden and uncharted rock—Insurers' liability.*
ATHEL LINE, LD. *v.* LIVERPOOL & LONDON WAR RISKS INSURANCE ASSOCIATION, LD.
Atkinson J. 567

2. —— **(Motor-car)**—*Extension of cover to person driving with insurer's permission — Double insurance — Subrogation — Breach of condition—Condition unknown to permitted driver.*
AUSTIN *v.* ZURICH, &c., INSURANCE CO., LD. - - - - - - - **C. A. 250**

3. —— *Policy — Third-party risks — Exceptions — Description of use — Proposal form—Whether passengers would be carried for hire or reward—Fatal accident to passenger—Practice of carrying some passengers in consideration of voluntary payments—No contract of hire—Expectation of reward.*
BONHAM *v.* ZURICH, &c., INSURANCE CO., LD. - - - - - - - **C. A. 292**

JUDGMENT — *Execution — Application to stay — Statutory body — Public duties — Possible interference with performance of duties — Insolvency — Priority as between unsecured creditors — Jurisdiction to grant stay—R. S. C., Or.* 42, *r.* 17.
MARINE, &c., ASSURANCE SOCIETY *v.* FELTWELL FEN SECOND DISTRICT DRAINAGE BOARD - - - **Evershed J. 394**

JUSTICES — *Jurisdiction — Breach of recognizance — Forfeiture — Conviction of offence—Right of Appeal — Mandamus — Summary Jurisdiction Act*, 1879 (42 & 43 *Vict., c.* 49), *s.* 9, *sub-s.* 2, *as amended by Criminal Justice Act*, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 26, *sub-s.* 1—*Criminal Justice Administration Act*, 1914 (4 & 5 *Geo.* 5, *c.* 58), *s.* 37, *sub-s.* 1.
REX *v.* JUSTICES FOR DURHAM. *Ex parte* LAURENT - - - - **Divl. Ct. 33**

2. —— *Mandamus to state case — Decision erroneous in point of law—Previous decision of judge of the Chancery Division—Refusal of magistrate to state case—Summary Jurisdiction Act*, 1857 (20 & 21 *Vict., c.* 43), *s.* 5—*Administration of Justice (Miscellaneous Provisions) Act*, 1938 (1 & 2 *Geo.* 6, *c.* 63), *s.* 19, *sch.* 1.
REX *v.* WATSON. *Ex parte* BRETHERTON
Divl. Ct. 96

3. —— *Motor car—Accident on road whereby a person, vehicle or animal, damaged or injured—Name and address not given to person reasonably requiring them—Obligation on driver to report accident to police—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 22, *sub-s.* 2 ; *s.* 40, *sub-s.* 2.
PEEK *v.* TOWLE - - **Divl. Ct. 458**

4. —— *Order for return of property—"Property taken from person charged before "a court of summary jurisdiction" — No accusation or charge made at time property taken—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict., c.* 49), *s.* 44.
ARNELL *v.* HARRIS - - **Divl. Ct. 60**

5. —— *Special Case — Statement — Application—Copy for each justice—Written application handed to justices in court—Summary Jurisdiction Rules*, 1915 (*St. R. & O.*, 1915, *No.* 200), *r.* 52.
GOLDMAN *v.* EADE - - **Divl. Ct. 57**

LANDLORD AND TENANT — *Rent restriction—"Part of a house let as a separate "dwelling"—Sole use by tenant of two rooms—Joint use with landlord of other rooms—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.
NEALE *v.* DEL SOTO - - - **C. A. 144**

2. —— *Rent restriction — Tenancy agreement—Terms—Supply by landlords of hot water and central heating—Notice to determine tenancy—Holding over by tenant as statutory tenant—Rights of statutory tenant—"Terms "and conditions of the original contract of "tenancy"—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15.
ENGVALL *v.* IDEAL FLATS, LD.
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LANDLORD AND TENANT—*continued.*

3. —— *Rent restriction — Statutory tenancy —Death of tenant—Inheritance of tenancy—Death of second tenant—Claim to further tenancy by inheritance—Meaning of "tenant" —Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).
SUMMERS *v.* DONOHUE - - **C. A. 376**

4. —— *Rent restriction — Claim for possession by personal representatives on ground that one of them required possession for her own occupation—Objection to form of action not taken at trial, nor in notice of appeal —Order for possession, subject to grant of a Rent Act protected tenancy of half the house, with joint use of kitchen and offices—Jurisdiction—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sch. I., para.* (*h*).
SHARPE *v.* NICHOLLS - - **C. A. 382**

5. —— *Rent restriction — House let in two separate parts — Subsequent letting of whole house — Standard rent — Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 2—*Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *ss.* 1, 7, *sub-s.* 1.
VAUGHAN *v.* SHAW - - - **C. A. 400**

6. —— *Rent restriction—"Part of a house "let as a separate dwelling"—Sole use by tenant of three rooms—Joint use with landlord and another tenant of other rooms—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.
COLE *v.* HARRIS - - - **C. A. 474**

7. —— *Rent restriction — Unoccupied house purchased after prescribed statutory date —Subsequent agreement by purchaser to let—Expiration of tenancy—Claim for possession —"Landlord who has become landlord by "purchasing the dwelling-house"—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *sch. I.* (*h*).
EPPS *v.* ROTHNIE - - - **C. A. 562**

8. —— *Rent restriction — Dwelling-house —Tenancy for term of years—Expiration, by effluxion of time—Tenant continuing in possession—Subsequent acceptance of rent by landlord—No evidence of new contractual tenancy—Landlord's right to sue for possession, without first serving notice to quit—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1; *s.* 16, *sub-s.* 3—*Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1, *and sch. I* (*h*).
MORRISON *v.* JACOBS - - **C. A. 577**

9. —— *Small tenements recovery—Service of statutory notice by landlord or his agent—Meaning of "agent"—Small Tenements Recovery Act*, 1838 (1 *&* 2 *Vict.*, *c.* 74), *ss.* 1 *and* 7.
BAILEY *v.* HOOKWAY - - **Divl. Ct. 266**

LAUNDRY. *See* CONTRACT.

LIABILITIES (WAR-TIME ADJUSTMENT). *See* EMERGENCY LEGISLATION.

LIEN — Claim to ring deposited by guest as security for bill. *See* MARSH *v.* COMMISSIONER OF POLICE, sub tit. INNKEEPER.

LIMITATION OF ACTIONS—*Public authorities protection— School— Governors— School managed under scheme made under Charitable Trusts Acts*, 1853 *to* 1894—*Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21, *sub-s.* 1—*Negligence—Frozen step—Injury to invitee —Negligence of cleaner.*
WOODWARD *v.* MAYOR OF HASTINGS **C. A. 174**

LOCAL GOVERNMENT — *Audit of accounts —District auditor—Power to require attendance of witness—Failure of witness to attend —Statutory penalty imposed on summary conviction—Continued non-attendance—Issue of subpoena—Jurisdiction—Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 5), *s.* 225, *sub-ss.* 1, 2.
REX *v.* HURLE-HOBBS - **Divl. Ct. 165**

2. —— *Building or structure—Ruinous or dilapidated condition—Detrimental to amenities of neighbourhood—Order on owner to repair—Power of local authority in default to demolish building or structure—Removal of rubbish resulting from demolition—Removal of machinery—Public Health Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 19), *s.* 58.
MCVITTIE *v.* BOLTON CORPORATION **C. A. 281**

3. —— *Street — Private street works — Apportionment of expense—Charge on premises—Action to enforce—"Sum recover- "able by virtue of any enactment"—Claim for "equitable relief"—Limitation—Private Street Works Act*, 1892 (55 *&* 56 *Vict.*, *c.* 57), *s.* 13, *sub-s.* 1—*Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2, *sub-ss.* 1 (*d*), 7; *s.* 18, *sub-ss.* 1, 5.
POOLE CORPORATION *v.* MOODY **C. A. 350**

4. —— *Street — Private street works — Making up—Expense—Apportionment on railway company—Land used as part of line—*

LOCAL GOVERNMENT—*continued.*

Failure of company to make objection within due time—Liability—Private Street Works Act, 1892 (55 *&* 56 *Vict., c.* 57), *s.* 7 (*f*), *s.* 22.
WATFORD CORPORATION *v.* LONDON PASSENGER TRANSPORT BOARD
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MASTER AND SERVANT — *Oral contract of employment—Implied term—Practice at works—Suspension of workman for misconduct—Refusal of workman to obey orders—Non-payment of wages—Whether breach of Truck Act,* 1896 (59 *&* 60 *Vict., c.* 44), *s.* 1.
BIRD *v.* BRITISH CELANESE - **C. A. 336**

2. —— Transference of employment — Hiring of vehicle and driver — Negligence of driver—Injury thereby caused to third person—Liability of regular employer or of hirer—Respondeat superior—Dock regulation. *See* DOWD *v.* W. H. BOASE & CO., LD.: MCFARLANE *v.* COGGINS & GRIFFITHS (LIVERPOOL), LD., sub tit. NEGLIGENCE.

MEDICINE—*Retailer—" Article consisting of " or comprising a substance recommended as a " medicine "—Label—Omission of appropriate designation of the substance, its active constituents or ingredients—Defence—No knowledge or reason to believe that the article consisted of or comprised such a substance—Pharmacy and Medicines Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 42), *s.* 11, *sub-s.* 1 (*a*); *s.* 13, *sub-s.* 1 (*a*).
PHARMACEUTICAL SOCIETY OF GREAT BRITAIN *v.* HEPPELLS (1932), LD.
Divl. Ct. 454

NECESSARIES. *See* HUSBAND AND WIFE.

NEGLIGENCE—Air-raid shelter erected on highway by local authority under statutory powers—Shelter unlighted—Collision of motorist with shelter—Duty of local authority—*See* FISHER *v.* RUISLIP-NORTHWOOD URBAN DISTRICT COUNCIL AND OTHERS, sub tit. EMERGENCY LEGISLATION.

2. —— *Master and servant — Transference of employment—Hiring of vehicle and driver—Negligence of driver—Injury thereby caused to third person—Liability of regular employer or of hirer—Respondeat superior—Dock regulation.*
DOWD *v.* W. H. BOASE AND CO., LD.: MCFARLANE *v.* COGGINS & GRIFFITHS (LIVERPOOL), LD. - - - - - **C. A. 301**

3. —— *Master and servant — Transference of employment—Hiring of lorry and driver—Negligence of driver—Injury thereby caused to servant of hirer—Liability of regular employer or hirer—Respondeat superior.*
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PENSION — Fireman of mercantile marine — Aggravation of organic disease—Injury caused by hard work, with increased effort in combating the enemy — " War injury " — Injury attributable to conditions abnormal in time of peace—No peril other than such conditions—" War risk injury" —Pensions (Navy, Army, Air Force and Mercantile Marine) Act, 1939 (2 & 3 Geo. 6, c. 83), ss. 3 and 10—Pensions (Mercantile Marine) Act, 1942 5 & 6 Geo. 6, c. 26), s. 1, sub-ss. 1, 2, 3; s. 5. *See In re* SAFFELL, sub tit. EMERGENCY LEGISLATION.

2. —— Civil defence volunteer — War service injury — Personal Injuries (Emergency Provisions) Act, 1939 (2 & 3 Geo. 6, c. 82), s. 8, sub-s. 1 —Pensions (Mercantile Marine) Act, 1942 (5 & 6 Geo. 6, c. 26), s. 5—Personal Injuries (Civilians) Scheme 1944 (St. R. & O., 1944, No. 369), Part IV., art. 2, para. 2 (*a*). *See Ex parte* HAINES, sub tit. EMERGENCY LEGISLATION.

3. —— *Pensions appeal tribunal — Appeal from decision of Minister—Evidence before quasi-judicial tribunal—Statement of " the case," containing reasons of Minister for his decision—Information given by medical member of tribunal to his colleagues—Pensions Appeal Tribunals Act,* 1943 (6 *&* 7 *Geo.* 6, *c.* 39), *s.* 6—*Pensions Appeal Tribunals Rules,* 1943 (*St. R. & O.,* 1943, *No.* 1757, L./39), *arts.* 5, 12.
MOXON *v.* MINISTER OF PENSIONS
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PERSON AGGRIEVED. *See* APPEAL.

PRACTICE — County Court — Claim for damages — No amount specified — Jurisdiction — Power to allow amendment restricting damages claimed to amount within county court jurisdiction — County Court Act, 1934 (24 & 25 Geo. 5, c. 53), ss. 40, 42, 64—County Court Rules, 1936—Or. 7, rr. 1, 2; Or. 15, rr. 1, 6. *See* LEGON *v.* COUNT, sub tit. COUNTY COURT.

2. —— Indictment — Particulars — Count alleging " acts in furtherance of " an illegal strike. *See* REX *v.* TEARSE, sub tit. CRIMINAL LAW.

PRACTICE—*continued*

3. —— Slander — Words not actionable without proof of special damage —Submission of "No case" at close of plaintiff's case—Ruling postponed —Evidence called for defendant. *See* CLEGHORN *v.* SADLER, sub tit. DEFAMATION.

4. —— *Writ — Service — Failure to serve within twelve months—Extension of time— Discretion of court—R. S. C., Or. 8, r. 1; Or. 64, r. 7.*
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